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Commissioner Sharp's term expired June 30, 1983.

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-Exchange Network Facilities
CC Docket No. 78-371

Appeal, Denied

Review Board denied appeal and affirmed ALJ's denial of a comparative broadcasting applicant's petition for leave to amend its transmitter site. Applicant's failure to amend within 20 months from vitiation of the reasonable assurance of its original site demonstrated extreme lack of diligence, was disruptive of the hearing, and prejudicial to the other parties.
-Shoblom Broadcasting, Inc.
BC Docket No. 82-135

Application, Amendment of, Engineering Change

(See: Appeal, Denied-*Shoblom Broadcasting, Inc.*)

Application, Mutually Exclusive

Commission establishes rules for selecting initial licensees by lottery in lieu of comparative hearings in certain Mass Media, Private Radio and Common Carrier Services. Where lotteries are used in Mass Media Services, minority and diversity preferences will be given. Preferences are not available, however in the Private Radio and Common Carrier Services.
-Random Selection/Lotteries
Gen. Docket No. 81-768

Application, Processing of

Petition for Reconsideration of Commission's 1982 Order establishing processing group for domestic fixed satellite applications denied. Petitioner failed to substantiate claim of mutual exclusivity, and Commission procedure determined to be more effective and efficient than alternative advanced by petitioner.
-GTE Satellite Corp.

Auxiliary Service

Report and Order adopted terminating proceeding which amended Part 74, Subpart F of rules to permit shared use of b/c auxiliary facilities with other b/c and non-b/c entities. New licensing policies established for TV b/c auxiliary stations.
-Amendment of Part 74
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–*Specialized Mobile Radio*

Business Radio Service, Frequencies
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Citizens Radio Service
Where licensee engaged in repeated and willful violations of three CB rules and also willfully interfered with Commission inspection of his station, license revocation was imposed. Mitigating arguments were rejected.
–*Theodore E. Sousa*
SS Docket No. 78–89

Common Carrier, in National Defense
Temporary waiver of Computer II rules granted to permit Department of Defense and other specified government agencies to continue to obtain new customer premises equipment in emergencies or to meet national defense and emergency preparedness needs from AT&T Long Lines or the BOCs until the divestiture of the BOCs.
–*AT&T Co.*

Common Carrier, Interconnection
Commission allows reconsideration for two issues relating to interconnection arrangements between and among domestic and international record carriers, as prescribed in *Interim Order*, 89 FCC 2d 928 (1982) but denies reconsideration on all other issues raised by petitions.
–*Interconnection Arrangements*
CC Docket No. 82–122

Common Carrier, Interconnection, Carrier To Carrier
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Common Carrier, Interconnection, Connecting Arrangements
Report and Order adopted concerning the operations of AT&T's separate subsidiary and the manner in which it relates to unseparated affiliates.
–*AT&T Co.*

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Common Carrier, International Record Carriers
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Common Carrier, Mobile Radio
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Common Carrier, Operating Expenses
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Common Carrier, Specialized Services

Notice of Proposed Rulemaking adopted seeking public comment on whether the divested BOCs should be required to offer enhanced services or CPE through a separate subsidiary.
–Customer–Provided Equipment
CC Docket No. 83–115

(See also: Agreement, Formal–*Exchange Network Facilities*)

Comparative Hearing

Review Board approved settlement agreement because it complied with 47 U.S.C. Sec. 311(C)(3) and granted FM broadcast application. Agreement was found to serve public interest and no party to it filed its application for purpose of reaching or carrying out such agreement.
–Cedar Creek Radio Company
BC Docket No. 82–46

Comparative Issue

In three party comparative broadcast proceeding, applicant A with substantial preferences for both diversification and integration over applicant B, and a substantial preference for integration over applicant C, is the preferred applicant.
–Family Broadcasting Group
BC Docket No. 81–808

COMSAT

Petitions for reconsideration or clarification of the Commission's Memorandum Opinion and Order (adopted August 5, 1982) denied except to the extent indicated therein.
–COMSAT
CC Docket No. 80–634

Control, Concentration of

Review Board affirms FM grant where credit due 100% female ownership integration proposal, combined with past local residence credit, overcomes opponent's previous broadcast experience, proposed future residence, and very slight comparative coverage preference. Auxiliary power proposals are deemed equal, and ALJ properly declined to add real party in interest or regional concentration of control issues.
–Cannon's Point Broadcasting Co.
BC Docket No. 81–306

Corporate Organization

(See: COMSAT–*COMSAT*)

Coverage, Principal City

Grant of applications for new transmitter locations affirmed in light of Commission abolition of suburban community, *Berwick* and *de facto* reallocation policies where compliance with licensing rules –provision of requisite signal to community of license, location of main studio in community, and programming proposal that will serve needs of community of license –supports presumption of intention to serve

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–*Ben Lomond B/cing Co.*

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Diversification, of Control of Mass Media
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Domestic Fixed Satellite
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Domestic Public Land Mobile Radio Service
Memorandum Opinion and Order adopted extending filing date for accepting cellular applications for all other markets to December 1, 1983 and revises procedural rules for licensing and operation of cellular communications systems. Part 22 of rules amended to change dates for filing direct and rebuttal cases and clarify the amended rules. Petitions for reconsideration requesting revision of procedural rules denied.
–*Cellular Communications Systems*

Memorandum Opinion and Order on Reconsideration (Part 2) adopted which deals exclusively with network, nationwide paging. Commission rejected the unanimous sharing requirement and extended cut–off procedures adopted in the *First Report and Order,* 89 FCC 2d 1337. Commission preempted state authority over technical standards, entry and rate regulations for three network frequencies.
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Application for renewal of educational TV station license granted. Complainant failed to raise substantial and material question of fact as to whether the grant would be in the public interest.
–*WHYY, Inc.*

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Equipment Authorization Program
Report and Order adopted revising rules in Subpart H of Part 15 for Class I TV Devices, now to be called TV Interface Devices. Thses are devices such as TV games and video cassette recorders which feed a signal to the antenna input of a TV receiver for display. The revision relaxes the limits on radiated emissions and permits use of stand–alone RF modulators.
–*TV Interface Devices*
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–*Jan–Di Broadcasting, Inc.*
BC Docket No. 82–627

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Petition for reconsideration of *George E. Cameron Jr. Communications* (KROQ), FCC 82R–58, 91 FCC 2d 870, denied.
–*George E. Cameron Jr. Communications*
Docket No. 20629

(See also: Application, Processing–*GTE Satellite Corp.*)

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(See also: Appeal, Denied–*Shoblom B/cing, Inc.*)

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(See also: Domestic Public Land Mobile Radio Service–*Cellular Communications Systems*)

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–*Oak Television of Everett, Inc.*
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Sunshine Act
Commission adopted amendments to rules concerning meeting procedures. One amendment makes clear that seven days notice requirement does not apply to meetings held to decide whether to call a future meeting with short notice. The other amendment eliminates inconsistencies in rule concerning announcements of meetings with short notice.
–*Amendment of Part O*

Sunshine Act, Grounds for Open Meeting
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Sunshine Act
Sunshine Act, Grounds for Open Meeting

Commission adopted amendments to rules concerning meeting procedures. One amendment makes clear that seven days notice requirement does not apply to meetings held to decide whether to call a future meeting with short notice. The other amendment eliminates inconsistencies in rule concerning announcements of meetings with short notice.
-Amendment of Part O

FCC 83-98

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 0.601(b) and Section 0.605(e) of the Commission's Rules and Regulations

ORDER

(Adopted: March 7, 1983 Released: March 11, 1983)

BY THE COMMISSION:

1. The Commission, *sua sponte*, has reexamined its Rule and Regulations relating to meeting procedures, particularly Section 0.601(b), 47 C.F.R. §0.601(b), which defines the term "meeting," and Section 0.605(e), 47 C.F.R. §0.605(e), which delineates the procedure to be followed in announcing meetings on short notice.

2. *Section 0.601(b).* The current definition of the term "meeting" includes deliberations concerning whether to schedule a future meeting with shorter notice than the seven days notice period generally required by the Sunshine Act, 5 U.S.C. §552b(3) and Section 0.605 of the Commission's Rules.[1] Consequently, those deliberations are subject to the statutory notice provisions and, therefore, the Commission is required to give seven days notice of meetings whose only purpose is to determine whether to call a future meeting with shorter notice. In *Washington Association for Television and Children v. FCC* (WATCH), 665 F.2d 1264 (D.C. Cir. 1981), the court noted that the Sunshine Act specifically exempts those deliberations from the statutory definition of "meeting." Thus, the

[1] The Sunshine Act provides for the scheduling of meetings on shorter notice when agency business so requires. 5 U.S.C. §552b(e)(1).

court characterized the Commission's rule as impermissibly broad, explaining that:

> The FCC's regulations implementing the [Sunshine Act] are stricter than the statute demands. The Commission's own definition of "meeting" does not contain an exception regarding deliberations about short notice like that found in §552b(a)(2) of the statute.
>
> . . . .
>
> The Commission's regulation requires it to give seven days' notice of meetings whose only order of business is to decide whether to call a future meeting with shorter notice . . . . The regulation increases the agency's administrative burden significantly with no conceivable corresponding public benefits.

WATCH, 665 F.2d at 1272–73. In light of that analysis, the court concluded that, in adopting Section 0.601(b), the Commission exceeded its rulemaking discretion under 47 U.S.C. §154(i).

3. Consistent with the court's decision in the *WATCH* case, the Commission is amending Section 0.601(b) of its rules to provide that the term "meeting" does not include deliberations which concern whether to schedule a future meeting with less than seven days notice.

4. *Section 0.605(e).* In formulating its rules concerning meeting procedures, the Commission recognized that the orderly conduct of the agency's business sometimes requires that a meeting be held within less than one week before its announcement, or even before an announcement. Section 0.605(e) describes the procedure to be followed in announcing meetings under those circumstances. That rule provides that announcements issued in those instances should specify "the nature of the emergency situation if it is not clear from the subject matter." Section 0.605(e).

5. In the *WATCH* case, the court briefly addressed the terms of Section 0.605(e) as follows:

> We pause to note, for the sake of clarity, that we are not questioning the specification of an emergency situation as justification for calling meetings on short notice. It must be remarked, however, that 47 C.F.R. §0.605(e) (1980) contains an apparent inconsistency: it begins with a calm reference to the prompt and orderly conduct of agency business as grounds for calling meetings on less than a week's notice, but ends with talk of emergencies. *WATCH*, 665 F.2d 1273 n.23. Thus, in order to eliminate any inconsistency in the text of Section 0.605(e), the Commission is amending that rule to strike the reference to emergency situations. This amendment will also obviate any debate about whether, in fact, the circumstances warranting that a meeting be scheduled with less than seven days notice present an emergency situation.

6. The Commission has formulated the amendments described herein to eliminate that part of Section 0.601 of the Commission's Rules which the court found impermissibly broad in *Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981), and to remove an inconsistency in the text of Section 0.605, also noted by the court. Therefore, compliance with the notice and comment provisions of the Administrative Procedure Act is

unnecessary. 5 U.S.C. §553(b)(B). Further, since these are amendments to rules of agency procedure, compliance with the notice and comment and effective date provisions is not required. 5 U.S.C. §§553(b)(A), 553(d).

7. Authority for the action taken herein is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 303(r). Accordingly, IT IS ORDERED that, effective immediately, Sections 0.601(b) and 0.605(e) of the Commission's rules, 47 C.F.R. §§0.601(b), 0.605(e), are amended, as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

47 C.F.R. Part O is amended as indicated below.

1. The first sentence of §0.601(b) is revised to read as follows:

> "(b) The term "meeting" means the deliberations among a quorum of the Commission, a Board of Commissioners, or a quorum of a committee of Commissioners, where such deliberations determine or result in the joint conduct or disposition of official agency business, except that the term does not include deliberations to decide whether to announce a meeting with less than seven days notice, or whether a meeting should be open or closed."

2. The last sentence of §0.605(e) is revised to read as follows:

> "In addition to other information, the announcement will contain the vote of each member of the agency who participated in the decision to give less than seven days notice, and the particular reason for that decision."

Forfeiture Procedures

Commission amended rules to bring the forfeiture procedures in agreement with a recently enacted amendment to the communications Act, which dispenses with the need to give cable system operators notice and opportunity to respond before Commission issues notice of apparent liability imposing forfeiture penalty. *–Amendment of Part 1*

FCC 83–108

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Implementation of P.L. 97–257; Amendment of Section 1.80(d) of the Commission's Rules and Regulations

ORDER

(Adopted: March 28, 1983 Released: March 30, 1983)

BY THE COMMISSION:

1. The provisions of Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), authorize the Commission to impose forfeitures on licensees and other holders of Commission authorizations without first, among other measures, issuing a warning and providing the opportunity for comment. Cable system operators are not licensed or authorized by the Commission in the traditional sense.[1] For purposes of Section 503(b), however, the Commission consistently has treated cable system operators in the same manner as licensees and other holders of Commission authorizations.[2]

2. By Public Law 97–257, September 13, 1982, the Congress revised Section 503(b)(5) to provide specifically that the Commission may impose forfeitures on cable system operators without first, *inter alia*, issuing a warning and providing the opportunity for comment. Thus, this statute was designed to ratify current Commission practice.

3. *Procedure, Section 1.80.* The forfeiture provisions of Section 503(b) of the Act are implemented through Section 1.80 of the

[1] Cable system operators are required to separately register each system community unit with the Commission.

[2] *See, e.g., Western Arizona CATV*, 49 RR 2d 646 (Cable TV Bureau, 1981.)

Commission's Rules, which closely follows the statutory language. Therefore, pursuant to the new statutory provisions, Section 1.80 will be amended to make clear that the Commission may impose forfeiture penalties on cable system operators without first, among other measures, issuing a warning and providing the opportunity for comment.

4. The Commission has formulated the amendment described herein to implement, in part, the provisions of P.L. 97–257. Therefore, compliance with the notice and comment requirements of the Administrative Procedure Act is unnecessary. 5 U.S.C. §553(b)(B). Further, because this is an amendment of rules relating to agency procedure, compliance with the notice and comment and effective date provisions is not required. 5 U.S.C. §§553(b)(B), 553(d).

5. Authority for the action taken herein is contained in Sections 503(b)(5), 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§503(b)(5), 154, 303(r). Accordingly, IT IS ORDERED that, effective immediately, Section 1.80(d) of the Commission's Rules, 47 C.F.R. §1.80(d), is amended, as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

47 C.F.R. Part 1 is amended by revising the second sentence of §1.80(d) to read as follows:

> However, a forfeiture penalty may be imposed, if such person is engaged in (and the violation relates to) activities for which a license, permit, certificate, or other authorization is required, or if such person is a cable television system operator.

Auxiliary Service
Rules, Amendment of
Television Auxiliary Broadcast Service

Report and Order adopted terminating proceeding which amended Part 74, Subpart F of rules to permit shared use of b/c auxiliary facilities with other b/c and non-b/c entities. New licensing policies established for TV b/c auxiliary stations.
–*Amendment of Part 74*
BC Docket No. 81–794

FCC 83–153

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 74, Subpart F of the Commission's Rules to Permit Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-broadcast Entities and to Establish New Licensing Policies for Television Broadcast Auxiliary Stations.	BC Docket No. 81–794 RM-3893

REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: April 7, 1983 Released: April 15, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ABSENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

I. *Introduction*

1. Before the Commission is a *Notice of Proposed Rule Making*, 46 Fed. Reg. 60024 (1981), in which we solicited comment on a number of proposed amendments to Part 74, Subpart F of our Rules dealing with television broadcast auxiliary stations. The *Notice* was divided into three major sections. The first section, prompted by a petition for rule making filed by the Public Broadcasting Service and a request for waiver submitted by Westinghouse Broadcasting Company, proposed to amend the auxiliary station rules to permit licensees to share their facilities with other entities. The second section proposed to expand the permissible uses of multiplexed audio signals transmitted on broadcast auxiliary stations. The third section of the *Notice* proposed various changes in our auxiliary station licensing policies. We concluded that the proposed amend-

ments, if adopted, would represent a substantial deregulation of the television broadcast auxiliary service.

2. A total of 23 comments representing 42 parties was received. Four parties filed reply comments. A list of those parties submitting comments is included as Appendix C.[1] Not all parties addressed every proposal set forth in the *Notice*. Rather than presenting an initial detailed comment summary, we will summarize the comments pertaining to each issue as we address that issue in this *Report and Order*.

II. *The PBS and Westinghouse Proposals to Permit Shared Use of Television Auxiliary Facilities*

3. *Channel Sharing—The Proposal.* Current Commission rules provide that television auxiliary stations are intended primarily for the transmission of program material to be broadcast by television stations owned by or under common control of the licensee of the auxiliary station. When the material transmitted is so used by the licensee, the programming also may be broadcast by any other television station. With limited exceptions, additional uses of auxiliary stations are forbidden. In the *Notice*, we proposed to broaden significantly the permissible use of broadcast auxiliary facilities yet retain the primary broadcast-related purpose of the service. Under the proposed rule, licensees of television auxiliary stations would be permitted to transmit any material—broadcast or non-broadcast—to any other entity whenever the auxiliary station is not being used to feed the licensee's broadcast station. The proposed rule contained no limitations on the amount of time that a facility could be used for alternative purposes. We sought comment on whether such unrestricted shared use ultimately might subvert the nature of the broadcast auxiliary service.

4. *The Comments.* The proposal to permit shared use of auxiliary facilities resulted in nearly unanimous support from the commenters. Of the parties commenting on this issue, only NBC asserts that auxiliary frequencies should be reserved exclusively for broadcast use. The commenters generally express the opinion that permitting shared use of existing facilities would promote the more efficient use of the spectrum and would obviate the need to construct costly parallel facilities. Because some auxiliary stations are used to transmit material to and from satellite earth facilities, Group W states that unlimited shared use will help develop a nationwide domestic satellite network and promote competitive sources of television programming. Educational broadcasters in particular express strong support for the time-sharing proposal. A group of noncommercial licensees filing jointly ("noncommercial licensees")

[1] The text of the rules amended as a result of this proceeding is included as Appendix A. Appendix B contains amendments to FCC Form 313, the application form for auxiliary stations.

states that by permitting the collection of additional revenues, the proposed amendments could aid in the formation of new statewide educational television networks and the strengthening of existing networks. PBS adds that facility sharing will further Congressional objectives by allowing public broadcasters to enhance their revenue-generating activities.

5. NBC, however, claims that the proposals will have an adverse effect on already crowded microwave frequencies in larger urban areas. NBC opines that where excess capacity is exhausted or unavailable, intense demand for additional spectrum could siphon frequencies from their primary intended use. According to NBC, the time-sharing proposals could exacerbate congestion in many markets to the point where use of frequencies for broadcast purposes may become impossible ". . . such as when a news emergency creates peak load pressure." If non-broadcast use of auxiliary facilities is allowed, NBC urges that the Commission take necessary precautions to preserve the essential character of the service.

6. Although arguing in favor of shared use arrangements, many commenters express some concern that excessive shared use may subvert the primary function of the broadcast auxiliary service. The Commission expressed similar concerns in the *Notice* and asked for suggestions on how to prevent misuse of auxiliary frequencies. We specifically sought comment on whether a particular limitation should be placed on alternate uses of facilities, such as a 50 percent limit on the total time that a facility could be used for non-broadcast purposes. Cox, Fetzer, and Multimedia, filing jointly ("Cox"), support a 50 percent use limitation. They contend that such a limit represents the minimum protection necessary to prevent a *de facto* reallocation of frequencies. They also assert that a limitation would deter broadcasters from acquiring "or even stockpiling" auxiliary licenses. Cox would enforce the 50 percent limitation by adding a "yes/no" box to the broadcast renewal form asking whether a licensee had complied with the policy. NAB supports a 50 percent limitation on the secondary use of mobile stations licensed in the broadcast auxiliary service. NAB claims that without some limit, unused mobile facilities might be turned into *de facto* fixed links used exclusively for non-broadcast purposes. NAB states that such exclusive non-broadcast use might create prolonged interference. NBC suggests that, if non-broadcast use of auxiliary stations is permitted, television pickup facilities should be restricted to broadcast use between the hours of 3:00 p.m. and 7:00 p.m. According to NBC, such a restriction would ensure the legitimate broadcast use of the service during peak news periods.

7. The other parties specifically addressing this issue argue against the adoption of any percentage limitations. The limitations are opposed as preventing the maximum efficient use of the spectrum. It is asserted that such artificial limitations would

encourage wasteful construction of parallel facilities or force the use of high-cost alternatives that would prevent experimentation and the development of specialized uses. Group W states that essential broadcast demands will ensure the integrity of the service. According to Group W, basic broadcast needs and growing scarcity will ensure that only truly excess capacity is utilized for non-broadcast purposes. The commenters representing noncommercial broadcasting interests argue most strenuously against any limitations. According to PBS, about one-half of all public stations use broadcast auxiliary stations to receive regional and national programming. Frequently, these stations are used less than nine hours per day. A 50 percent limitation would limit further use of the facilities for non-broadcast purposes to only 12 of the remaining 15 hours per day. The Ohio Educational Broadcasting Network Commission states that a 50 percent limitation on the use of auxiliary stations ". . . creates burdensome responsibilities on broadcasters in terms of record keeping and reporting without so much as a scintilla of evidence that there is any corresponding public benefit." In reply comments, PBS rebuts NAB's concerns about misuse of mobile facilities as a largely conjectural problem that should be dealt with on an *ad hoc* basis. PBS suggests that such a limitation would not reduce interference unless the total number of pick-up authorizations is reduced.

8. Several commenters indicate that concern over the misuse of broadcast auxiliary facilities could be addressed best through the licensing process. Bonneville International states that broadcasters must be prevented from obtaining auxiliary licenses for the sole purpose of transmitting non-licensee or non-broadcast materials. NAB adds that new authorizations should be granted only to those broadcasters needing a facility for broadcast-related uses. PBS agrees and would require all applicants for new facilities to demonstrate a legitimate broadcast need for the facility. The noncommercial licensees suggest that renewal applicants should be required to show that only excess capacity was leased.

9. *Discussion.* After careful review of the comments, we believe that broadcasters should be given the widest possible latitude in the use of excess capacity on licensed broadcast auxiliary facilities. We will therefore permit broadcasters to share their facilities with any other entity for the transmission of any material, broadcast or non-broadcast.[2] These measures are intended to promote the more efficient use of the increasingly crowded electromagnetic spectrum. Allowing such shared use, without limitation, should prevent any

[2] Facility sharing will not be permitted on the four Band B channels between 6,425 MHz and 6,525 MHz that were recently allocated to the Broadcast Auxiliary Service on a secondary basis. *Amendment of Part 2 of the Commission's Rules Governing Frequency Allocations*, 50 RR 2d 1106 (1982). The 6,425 MHz - 6,525 MHz band is still allocated primarily to the Local Television Transmission Service, and it would be inappropriate to allow broadcast licensees to share those frequencies to which they have only secondary rights.

necessity to construct costly parallel facilities where existing facilities can handle an increased load. These measures also will make the construction of new facilities more cost-effective because the expenses incurred to build and operate new facilities can be partially recouped through shared use.[3]

10. In order to take the fullest advantage of the spectrum efficiencies that shared use will provide, and to afford broadcast licensees maximum flexibility in offering excess capacity to other entities, we will adopt no time limitations on the shared use of television auxiliary facilities. So long as a licensee utilizes its auxiliary stations primarily for legitimate and essential broadcast use, we see no reason to restrict the licensee's station-sharing activities. Forcing auxiliary stations to remain idle when legitimate demands for frequencies exist is precisely the situation that we are attempting to avoid. In the context of this proceeding, we believe shared use limitations would be inefficient and counterproductive to the attainment of our objectives.

11. We have also decided to delete from proposed Section 74.631(f) the restriction limiting alternative uses to times when the station is not being used to transmit program material to its associated broadcast station. Technology is available that allows the simultaneous transmission of two video channels on one microwave link. Thus, one channel could feed the licensee's associated broadcast station while the second could be used for alternative purposes. The above-noted restriction, however, would preclude such simultaneous transmissions. We wish to encourage the development of these spectrum-efficient technologies, and the deletion of the proposed restriction clearly facilitates this policy.[4]

12. As indicated in the comment summary, several parties suggest that use limitations are necessary to preserve the primary purpose and continued utility of the television auxiliary service. Although we share some of the concerns voiced by the proponents of such limitations, we believe other, less obtrusive, means should be implemented to assure that the primary function of the service is maintained. To this end we are establishing several safeguards designed to ensure the integrity of the auxiliary service. First and

[3] In the Notice, we solicited comments concerning the degree to which the instant proposal could satisfy several requests for additional spectrum for aural broadcast STL and intercity relay stations. Although no comment was received in this issue, we encourage aural broadcasters, wherever possible, to use channels that may become available as a result of our action in this docket.

[4] At their current state of development, these channel compression techniques decrease picture quality somewhat. Although we doubt that such operations will become widespread due to this decrease in quality, in particular situations a licensee may deem the quality loss acceptible. So long as the use of these techniques does not interfere with the licensee's primary broadcast-related transmissions or other licensees' uses of the spectrum, we see no reason to prohibit the utilization of these new technologies.

foremost, we will not change our policy of granting broadcast auxiliary authorizations only to licensed television broadcasters. Thus, we will not allow non-broadcast entities to receive licenses in the television auxiliary service.[5] As a result, the television broadcast industry itself will retain complete control over, and responsibility for, the proper use of television auxiliary facilities. Individual television licensees will specify the conditions under which they will share their equipment. If use of a licensee's equipment by another party causes harmful interference, it is the responsibility of the sharing licensee to correct the problem expeditiously. The Commission will hold the broadcast licensee responsible for any interference or misuse of the facilities that occurs during operation by the non-licensed user. We fully expect that television licensees will take these responsibilities seriously since the willful or repeated misuse of auxiliary facilities would certainly impact upon a licensee's qualifications to hold a broadcast authorization.

13. Second, it is important to keep in mind the fact that we are authorizing only the shared use of an existing station's excess capacity. We will not grant new authorizations to licensees seeking only to provide secondary service. Also, we will not permit licensees to obtain additional authorizations in order to divide their primary transmissions between two or more facilities, thereby generating additional excess capacity. Such activity would not only tend to subvert the primary function of the broadcast auxiliary service, but it would also negate much of the spectrum efficiency we are seeking to promote. As suggested by several commenters, oversight of these licensing restrictions will be accomplished by the addition of three questions to the broadcast auxiliary station application, FCC Form 313. The first new question will request a brief statement regarding the primary purpose of the requested auxiliary link. The second question will seek information on the amount of sharing that the applicant anticipates for the new link. Third, we will ask the applicant to tell us the number of auxiliary authorizations already held and the approximate amount of time that these existing stations are being used by other entities. We readily admit that in most instances we are hesitant to add new reporting requirements. However, these new requirements represent a miniscule burden on the licensee while allowing the Commission to implement its important new facility-sharing policies.

14. We also wish to make it clear that the non-broadcast uses authorized in this proceeding are strictly secondary to the primary function of the broadcast auxiliary service. To emphasize this point, we are making two additions to the rules as proposed in the *Notice*. First, we are adding a "non-broadcast use" category to the newly established set of priorities found in Section 74.604(c). This addition

[5] See also paragraph 30, *infra*.

makes it clear that for the purpose of interference protection, any facility being used for non-broadcast purposes must give way to other facilities being used for *bona fide* transmissions to a licensee's associated broadcast station.[6] Second, we are adding language to new Section 74.631(f) that obligates licensees to coordinate their channel sharing activities with other broadcast licensees in the area. This requirement is similar to the provisions recently adopted in BC Docket 81–497, in which we authorized broadcasters to utilize auxiliary frequencies for up to 30 days per year without notifying the Commission.[7] With respect to fixed link services, this notification process should not pose any particular hardship on the licensee. The obligation to notify other area licensees is most crucial with respect to the shared use of mobile facilities, which have a greater potential for causing interference. We believe this process is more desirable than the restrictions on the use of mobile facilities urged by NAB and NBC. No absolute restrictions are placed on mobile facility sharing, but licensees offering excess capacity for shared use have an affirmative responsibility to inform other licensees of proposed uses. This should enable all area licensees to coordinate the use of their auxiliary facilities in order to prevent interference and disruption of service.[8]

15. The flexible facility-sharing activities that we are authorizing herein represent a significant deregulation of the broadcast auxiliary service. However, with this increased freedom comes increased responsibility. Licensees choosing to share their facilities must be willing to accept that responsibility and conduct their channel sharing affairs accordingly. Certainly we will not hesitate to revisit our actions if it appears that licensees are misusing their auxiliary facilities to the detriment of the broadcast auxiliary service.

16. *Profit Making vs. Nonprofit Sharing of Facilities—The Proposal.* At paragraph 10 of the *Notice*, we solicited comment on whether licensees should be able to sell their excess capacity to other entities for a profit or instead be limited to nonprofit, cost-sharing arrangements. We noted our concern that licensees operating on a for-profit basis may take on certain characteristics of communications common carriers, but that broadcast licensees had traditionally not been subject to common carrier regulation under Title II of the Communications Act. Before deciding this issue, we noted that ". . . a

[6] The priority system established in this *Report and Order* is discussed in detail in Section IV, *infra.*

[7] *Amendment of Part 74 of the Commission's Rules to Provide for Short-Term Operation Without Prior Approval*, 50 RR 2d 1492 (1982); Section 74.24.

[8] We also note that, although available to broadcasters only on a secondary basis, licensees may utilize the spectrum between 6,425 MHz and 6,525 MHz solely for television broadcast operations. Of course, use of those channels must be cleared first with the local LTTS operator. See n. 2, *supra.*

record should be developed that adequately addresses all the relevant legal and policy ramifications and associated common carrier implications . . ." of the proposal to sell excess capacity for a profit.

17. *The Comments.* With one exception, all parties commenting on this issue urge that licensees be free to make a profit on their shared use of broadcast auxiliary facilities.[9] As a matter of policy, Cox contends that allowing licensees to charge for their excess time is consistent with a marketplace approach. Cox also asserts that profit making will allow greater licensee flexibility while creating more incentives for efficiency, innovation and experimentation. The Christian Broadcasting Network states that in addition to encouraging new links and program services, permitting profit making will avoid economic distortions that might develop if cost-sharing were mandated. According to CBN, cost sharing may result in overdemand for broadcast auxiliary facilities. PBS adds that there is no compelling regulatory interest to justify a prohibition on profit making so long as auxiliary facilities are used and obtained primarily for broadcast purposes. Group W contends that the line between cost sharing and profit making is sufficiently blurred to preclude restrictions on profit making. Group W avers that the differences between costs saved and dollars earned are more semantic than real. According to Group W, the record keeping and accounting burdens on licensees plus the policing burden on the FCC are further reasons not to adopt the cost-sharing option. The noncommercial licensees filing jointly aver that making a profit on the sale of excess capacity is essential. They contend that the measure will provide sorely needed revenues at a time of diminishing federal support for noncommercial stations. Several other noncommercial entities suggest that the profit-making option is consistent with Commission attempts to promote the financial self-sufficiency of public broadcasters and is just what Congress had in mind when it passed Section 399B of the Communications Act which permits public broadcasters to engage in the offering of services for remuneration. The Ohio Educational Broadcasting Network Commission states that auxiliary facilities should join earth stations, studios, towers, and remote equipment among the facilities available for resale.

18. *Discussion.* We are of the opinion that broadcast licensees should be permitted to offer the excess capacity of their auxiliary facilities to others on a for-profit basis. Several factors lead us to this

[9] The California State Communications Division was the only commenter supporting nonprofit, cost-sharing use of auxiliary facilities. The Division, however, offered no reasons for its position. Bonneville International, while having no fundamental objection to profit making in this context, believes that guidelines should be established to prevent broadcasters from subverting public interest programming considerations to profit-making objectives. Bonneville, however, offered no suggestions as to the content of any such guidelines.

conclusion. First, it clearly reflects the intent of Congress in its recent decision to permit noncommercial broadcast stations to offer their facilities to others for remuneration.[10] The noncommercial broadcasters commenting on this issue indicate that the additional revenues gained through offering their auxiliary stations to others may prove crucial in their efforts to overcome reduced federal funding. By allowing profit making, we are continuing our efforts to develop a regulatory environment that permits public broadcasters to make the most efficient use of their facilities and thereby supplement their revenues in the face of dwindling federal financial support.

19. The argument of Group W, that the distinction between dollars earned and costs saved is often more semantic than real, also supports our decision. Group W intends to transmit a programming package to various buyers across the country via its interconnected auxiliary station/satellite earth station network. Consumers will be purchasing a delivered finished product. It makes little sense to require Group W, for example, to charge for the distribution of the package on a cost-sharing basis when the company can then charge a higher price for the programming component. The total price to the buyer would remain the same. Because it would be nearly impossible to allocate monies consistently to one function or the other, establishing a cost-sharing scheme for the distribution segment of such a service would be meaningless at best and possibly counterproductive due to increased administrative costs.

20. Finally, we do not anticipate that profit making will impede the proper functioning of the broadcast auxiliary service. Any broadcasters who may be tempted to subordinate the public interest to their own private pecuniary interests run the risk of jeopardizing their standing as licensees. Also, our resolve not to permit new authorizations for secondary uses forecloses the possibility of licensees seeking additional facilities solely to engage in profit making channel sharing activities. In short, profit making offers potential benefits to all licensees—particularly noncommercial broadcasters—without, we believe, adversely affecting the auxiliary service.

21. *Common Carrier Regulation—The Comments.* With nearly unanimous agreement, the commenters contend that offering broadcast facilities on a for-profit basis does not require the Commission to engage in common carrier regulation of such activity.[11] The parties

[10] Omnibus Budget Reconciliation Act of 1981, §1231, 47 U.S.C. §399B(b)(1). The Act further requires that such an offering "shall not interfere with the provision of public television services." Because we are enacting several safeguards to prevent the misuse of auxiliary frequencies, we do not believe that permitting channel sharing will in any way interfere with the provision of public television services.

[11] PBS suggests that even if common carrier regulation is imposed, broadcasters should have the option of filing tariffs and making a profit or offering their facilities on a nonprofit, cost-sharing basis.

claim that licensees will be highly selective in allowing use of auxiliary facilities by others so as not to disturb the facilities' principal broadcast use. Licensees must retain control of their facilities in order to make them available for essential broadcast purposes. Therefore, licensees will not hold out their facilities indiscriminately on a first come, first serve basis, but will make individualized decisions for each potential user. The parties argue that, under the rationale of *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) (*"NARUC I"*), entities that make individualized decisions whether and on what terms to deal are not common carriers subject to Title II regulations.

22. Individual commenters make several other arguments against the imposition of common carrier status. According to the Florida Public Broadcasting Service ("FPBS"), the intent of the Omnibus Budget Reconciliation Act and the Public Telecommunications Financing Act is to allow public stations to hold out facilities for hire without incurring common carrier status. FPBS also states that selling excess capacity on satellite earth stations is not a common carrier activity, and that selling excess capacity on broadcast auxiliary stations should be accorded similar treatment. Finally, Christian Broadcasting Network and Fisher suggest that any instances of common carrier activity arising from the sale of broadcast auxiliary capacity would be infrequent. Fisher adds that there is no danger of monopoly pricing practices because there will be an abundance of competition. CBN and Fisher conclude that if common carrier activity becomes substantial, the Commission can revisit the area and take appropriate action at that time.

23. *Discussion.* As most of the commenting parties stressed, the District of Columbia Circuit Court of Appeals in *NARUC I* specifically stated that a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. 525 F.2d at 641. The Court noted that a common carrier need not serve the whole public, and private carriers may serve a significant clientele. The Court then proceeded:

> Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. *Id.* at 642. The Court then stated that in determining whether a particular carrier should be accorded common carrier status, a finding must be made as to whether any legal compulsion to serve indifferently exists, or whether there are reasons implicit in the nature of the operation to expect an indifferent holding out.

24. Clearly there exists no legal compulsion for licensees to offer their facilities in an indifferent manner. Such a requirement would be directly contrary to the primary broadcast-related purpose of the broadcast auxiliary service, which is intended to serve the program distribution needs of the television industry. Thus, we can not

discern, nor would we establish, any legal requirement that broadcast licensees offer their broadcast auxiliary facilities on an indifferent basis.

25. With respect to the second test for classifying common carriers, whether there are reasons implicit in the nature of the operation to expect an indifferent holding out, we believe that such holding out is unlikely to occur. The demands of the licensee's broadcast transmission needs should preclude a general and indifferent holding out to all potential users. We suspect, and the commenters on this issue state, that licensees will negotiate with and select users on a highly selective basis due to licensees' own demands for the facilities. Because licensees must retain complete control of their facilities to ensure the integrity of their broadcast services, it does not appear that they will be in a position to offer indifferently their facilities to other users.[12] Moreover, with respect to the distribution services envisioned by Group W and PBS, it appears that they would be marketed on the basis of long-term syndication contracts with potential buyers. Both of these factors—the individualized selection of clients and the establishment of service through long-term contracts—were factors thought by the Court in *NARUC I* to be inconsistent with common carrier status. 525 F.2d at 643. We can find no basis for believing that anything inherent in the channel sharing activities of broadcast licensees will lead them to make indifferent offerings of excess channel capacity. Thus, we find the imposition of common carrier regulation inappropriate in this context.

26. The Court in *NARUC I* warned that, if common carrier activity did ensue, it would be incumbent on the Commission to determine the extent to which traditional Title II regulation should be applied. *Id.* at 644. Because of the essential nature of the broadcast services performed by auxiliary facilities, and because of the safeguards we are establishing to prevent licensees from obtaining new stations solely for nonbroadcast use, we do not anticipate that our initial analysis will be proven wrong. However, in the event that licensees do begin behaving like common carriers, by indiscriminately offering their facilities to all potential users, we can certainly revisit this issue and make appropriate changes in our

[12] We realize that it is technologically possible, using channel compression techniques, for a licensee to transmit two video signals simultaneously on a single microwave link. Thus, a licensee theoretically could use these techniques to generate a full-time video channel of excess capacity. We do not anticipate, however, that licensees will make widespread or routine use of these channel compression techniques because at this stage of their development they result in decreased picture quality. Nor do we expect, given broadcasters' continuing need for a high quality video signal pathway, that licensees will be any less selective in their offering of such compression-based capacity than they would if only a single video channel were available to them. Thus, we do not believe that our common carrier analysis will be significantly affected.

treatment of licensee channel sharing activities, either by treating the activity as a common carrier offering subject to Title II and state regulation, or by not permitting it to continue.

27. *Reporting Requirements/Oversight of Sharing Agreements—The Comments and Discussion.* In response to our queries regarding whether the Commission should institute any continuing reporting requirements or undertake to review any facilities-sharing agreements, the commenters universally state a lack of need for any such regulations. With respect to facility-sharing agreements, PBS notes that similar agreements concerning the use of satellite facilities are no longer submitted routinely to the Commission. PBS states that because many distribution systems utilize satellite earth stations and auxiliary stations, the Commission's treatment of both types of facilities should be the same. Aside from the minimal additions we are making to the auxiliary station application form discussed at paragraph 12, we will not initiate any continuing reporting requirements to monitor the use of auxiliary facilities. We do not expect any problems to arise from our rule amendments, and reporting requirements would constitute a needless and costly burden on licensees. Because we are imposing no restrictions on the shared use of licensee facilities, we see no valid purpose in requiring licensees to submit copies of their shared use agreements to the Commission. Again, such a requirement would exact a burden on licensees with no corresponding benefit to the Commission or the public. Therefore, user agreements need not be filed with the Commission.[13]

28. *Miscellaneous Issues.* Several commenters raise additional issues concerning shared use of auxiliary facilities. The California State Communication Division urges the Commission to allow broadcast auxiliary licensees to interconnect their facilities with terrestrial microwave stations in the Private Operational Fixed Microwave Service (POFMS) that are operated by public entities. To the extent that broadcast auxiliary licensees utilize only their excess capacity, nothing would prevent such interconnection. However, as stated previously, we will not license new broadcast auxiliary stations for non-broadcast purposes. Thus, we would not authorize a new auxiliary station merely for interconnection with, or extension of, a POFMS network.

29. Gill Industries and Hughes Aircraft Company, Microwave Communications Products ("Hughes"), ask that the time sharing proposals being implemented in this docket be extended to Community Antenna Relay Service (CARS) operators licensed under Part 78 of the Commission's Rules. They contend that the same reasons supporting shared use for broadcast facilities also apply to CARS facilities. We agree that the logic of our actions easily might be

[13] As suggested in the *Notice*, we will also delete the reporting requirements from Section 74.631(h) of the Commission's Rules.

extended to CARS. However, CARS facilities are utilized by an entirely different set of licensees, and we believe that it would be both unfair and unwise to extend our actions to CARS without first notifying those licensees of our intentions. Nothing in the instant *Notice* remotely suggested that we might extend our actions to CARS facilities, and, absent such prior notice, we will not do so.[14]

30. In the same vein, Entertainment and Sports Program Network (ESPN) asserts that non-broadcast entities should be permitted to obtain licenses in the broadcast auxiliary service. ESPN states that, because they are neither broadcasters nor cable system operators, certain entities such as ESPN which produce and distribute programming are not eligible to receive auxiliary licenses. However, because their material is intended for broadcast or cablecast purposes, they likewise are precluded from obtaining facilities in the private radio services. ESPN avers that the shared use proposals will not adequately remedy this problem, and that the only satisfactory answer is for such program producers to receive their own authorizations. We recognize ESPN's problem, but we do not believe that this proceeding is the proper forum for resolving it. As with the proposal to expand our actions to CARS, the *Notice* contained no reference to expansion of the entities eligible for broadcast auxiliary authorizations. Indeed, one of the principal safeguards against misuse of broadcast auxiliary facilities is our resolve to limit licensing to broadcast station licensees. Further, allowing non-broadcast entities to receive Part 74 licenses surely would constitute a reallocation of frequencies that must be preceded by public notice. For these reasons, we decline to act on ESPN's request in this docket.

III. *Expanded use of Multiplexed Audio Signals Transmitted Over Television Auxiliary Broadcast Stations.*

31. *The Proposal.* Under current Commission policy, the transmitter of a television broadcast auxiliary station may be multiplexed to provide additional communication channels for the transmission of aural program material and operational communications. However, multiplexed audio material may be used only by AM, FM, or TV broadcast stations owned by or under the common control of the licensee of the broadcast auxiliary station. Thus, broadcast or non-broadcast entities may not utilize the multiplexed audio material transmitted over another licensee's auxiliary facilities. By contrast, video programming transmitted over auxiliary facilities may be utilized by any other broadcaster if the subject programming is broadcast by the transmitting licensee. In the *Notice* we stated that the discrepancy in the permitted uses between audio and video

[14] We note that Westinghouse Broadcasting and Cable, Inc. recently filed a petition for rule making proposing, *inter alia*, that channel sharing be permitted for CARS licensees.

programming transmitted via television broadcast auxiliary stations made little sense, and we proposed to allow the greatest possible latitude in the use of audio signals transmitted over television broadcast auxiliary stations.

32. *The Comments.* Fourteen of the comments filed in this proceeding specifically addressed this topic. Most of those comments merely express support for the proposal for much the same reasons they supported the facility-sharing proposals discussed above. However, several parties offer more specific comments. National Public Radio supports the proposals as promoting spectrum efficiency and providing opportunities for licensees to recoup some of the cost of maintaining auxiliary facilities. NPR specifically favors the multiplexing proposal because facilities then could be made available to public radio which would aid in the production and distribution of radio programming. The Christian Broadcasting Network argues against placing any restrictions on the type of material transmitted over broadcast auxiliary stations or on the permissible receiver of multiplexed material. Such a nonrestrictive policy would have clear spectrum and cost efficiencies, according to CBN.

33. The National Association of Broadcasters considers parallel regulation of audio and video transmission essential. NAB notes that either the multiplexed audio channels or the primary video transmission (or both) may possess excess capacity, and it concurs in the Commission's proposal to permit the greatest possible latitude in the use of multiplexed audio signals. However, NAB points out that proposed Section 74.631(d) makes no specific reference to the number of audio channels or control signals that may be multiplexed, except for the general provision against causing harmful interference to stations transmitting television broadcast material. NAB contends that interference can be caused to facilities on adjacent channels by exceeding the allowable emission bandwidth and that the number of possible channels that can be multiplexed without exceeding that bandwidth is limited. NAB suggests that the Commission consider specific technical requirements "which do not preclude the number and nature of available multiplexed transmissions, yet provide a mechanism whereby a licensee can ensure that its auxiliary facility cannot reasonably be expected to cause adjacent channel interference to other television auxiliary facilities."

34. *Discussion.* The comments clearly demonstrate that greater discretion should be afforded broadcasters in their use of multiplexed audio signals transmitted over broadcast auxiliary stations. No commenter opposed expanding the permissible uses of such signals, and those commenters favoring the rule amendments argued for the widest possible latitude in the transmission of multiplexed material. In the *Notice* we proposed the unrestricted use of multiplexed audio material. However, at this time we see no need to limit multiplexed signals to audio material. We will therefore permit the

transmission of all multiplexed material, such as data, telemetry, or facsimile. Thus, aside from the prevention of harmful interference to other broadcast auxiliary station licensees, we will impose no restrictions on a broadcaster's use of multiplexed signals. To the extent that a licensee has excess capacity, that capacity may be utilized to transmit any type of material to any entity. Also, for the same reasons outlined in Section II, above, licensees will be permitted to sell their excess capacity to other users on whatever basis they choose. We also do not intend to institute any reporting or oversight regulations of these secondary uses of broadcast auxiliary stations. As with sharing of the primary video channel, licensees must retain complete control of their facilities and are wholly responsible for their proper use.

35. With respect to the suggestion of NAB that we adopt specific technical standards to prevent adjacent channel interference, we believe such standards are unnecessary. As NAB notes in its comments, there is a limited number of channels that can be multiplexed without exceeding the emission limitations set forth in Section 74.637 of the Rules. These emission limitations have proved adequate in the past and there is no evidence that they will be less so in the face of more intensive multiplexing. Accordingly, in view of the flexibility provided by the proposed rule, we believe that no additional action on this question is warranted at the present time.

IV. *Licensing Policy*

36. *The Proposals.* The final section of the *Notice* dealt with various aspects of our licensing policy and proposed to bring the Commission's rules in line with actual Commission licensing practice. First we noted that due to increased demand for auxiliary channels, exclusive channel assignments were no longer granted. We therefore sought comment on our proposals to eliminate any reference in our rules to exclusive assignments and to rescind all existing exclusive assignments. In order to further promote the more efficient use of the spectrum, we proposed to grant only single frequency authorizations for fixed link services. We also proposed to end current restrictions on the number of authorizations any one licensee could possess. In recognition of the fact that the Commission staff no longer conducts frequency coordination for every application for a new authorization that is submitted, we proposed relying on licensee assurances that the frequency selected for a proposed station was appropriate and calculated to avoid creating interference to existing services. Under the proposed rule, applicants for new stations would be free to conduct their own frequency coordination studies or rely on information provided them from local frequency coordination committees where they exist. We stated that whether the frequency coordination was done through a committee or individually, assuming the other aspects of the application were in

order, the application would be granted on the assumption that the frequency requested would not interfere with existing services.

37. Assuming that some interference complaints would be brought to the Commission, we proposed implementing a priority system as a mechanism for resolving interference disputes between existing licensees. The priority system would also be used to determine which channels would be withdrawn in case over-crowding resulted in a new licensee being unable to obtain a vital auxiliary link. Under the system proposed, STLs and CARS links were afforded highest priority. Intercity relay stations and television pickup stations tentatively were assigned the second and third priorities, respectively. Fourth priority was proposed for fixed links operating outside a licensee's local service area and translator relay stations. Lowest priority was proposed for normally unused alternate or backup facilities and television pickup stations operating outside a licensee's local service area. In the *Notice*, we anticipated utilizing the priority list for resolving interference disputes and for withdrawing existing authorizations in the unlikely event that overuse of the spectrum made additional channels unavailable.

38. *Exclusive Channels—The Comments.* The Commission's rules provide that licensees may request and obtain the right to operate exclusively on a particular frequency in a given market. In the *Notice* we sought comment on our proposal to eliminate these exclusive channel assignments. Comments in response to this proposal were mixed. CBS, Cox, Fisher, Gill, and Hughes support the elimination of exclusive assignments while NAB, two sets of noncommercial educational licensees, and NBC favor retaining at least some exclusive authorizations. Acknowledging that the Commission has not granted exclusive assignments in several years, CBS asserts that the rules should be amended to reflect the actual practice of the Commission. CBS further contends that exclusive assignments are not an efficient use of the spectrum. CBS argues that existing exclusive authorizations should be allowed to expire at the end of the licensee's current license term. Cox suggests that existing exclusive assignments could be terminated prior to expiration of the license term since the termination would be the result of a rule making of general applicability. Based on its experience in the use of Band D frequencies, Hughes states that the same frequencies can be reused extensively in the same geographic area on different azimuths. According to Hughes, exclusives preclude such reuse and are therefore wasteful.

39. NAB opposes the rescission of existing exclusive assignments and suggests that such assignments should be "grandfathered" subject to voluntary relinquishment by agreement of the licensee. NAB states that if existing exclusive authorizations are eliminated, licensees should be given advance notice of the rescissions. NBC avers that, at the very least, every licensee should be granted one

exclusive assignment for use as the licensee sees fit. The noncommercial licensees state that we should retain exclusive authorizations for STLs, but otherwise allow nonexclusive grants on a strict, noninterfering basis. A second group of noncommercial licensees, represented by Schwartz, Woods & Miller (hereinafter "Schwartz"), asserts that Commission policy must be founded on the protection of essential auxiliary services, and that elimination of exclusive authorizations would preclude these necessary protections. Schwartz contends that exclusive assignments must be maintained to guarantee a legitimate expectancy of continued uninterrupted use. According to Schwartz, severe economic costs will result from disruptions in service and instability if exclusive assignments are eliminated. Schwartz states that frequency coordination costs will increase and program disruptions will become more common and opines that these factors will offset any resulting gains in spectrum efficiency.

40. *Discussion.* As stated in the *Notice*, due to the increasing demand for channels in the bands allocated to the television broadcast auxiliary service, the Commission has not granted exclusive channels for the past several years. The commenters present no evidence that the absence of additional exclusive authorizations has jeopardized in any way the proper functioning of television broadcast stations. Further, as Hughes correctly points out, the same frequencies can be used within a market so long as the transmit and receive points are taken into consideration. For these reasons, we will formalize our recent practice and eliminate any reference in our rules to the issuance of new exclusive authorizations in the television broadcast auxiliary service. Further, nothing in the comments persuades us that existing exclusive assignments should be retained. Those existing exclusive assignments represent an inefficient use of increasingly crowded spectrum. We wish to emphasize that all licensees still will have the protected use of a particular frequency on a specific pathway. Proper frequency coordination in a given market effectively should preclude interference on those protected pathways. Thus, we do not foresee any change in circumstances for those licensees losing the "exclusive" status of their existing authorizations. At the expiration of a licensee's present license period, any exclusive authorization held by that licensee will lapse. Those auxiliary licenses will be renewed as usual, but not on an exclusive basis. This action should help alleviate the congestion arising in the use of auxiliary frequencies without making any perceptible change in the level of interference that licensees currently experience.[15]

41. *Frequency Coordination and Application Procedures—The Comments.* Section 74.604(a) of the current rules states that the

[15] It appears that most existing exclusive assignments are for fixed link services. As discussed below, such services retain the highest priority for purposes of interference protection.

Commission no longer conducts frequency coordination for the auxiliary service. We stated in the *Notice* that we grant licenses on an inference of noninterference to existing users and sought comment on whether our inferences were well-founded. We also asked interested parties to respond to our proposal to acknowledge formally the existence of local frequency coordination committees and rely on those committees to provide frequency selection information to applicants for new authorizations. Again, we received mixed reactions to our proposals and no consensus among the commenters exists. Most of the parties addressing this issue agree that frequency coordination at the local level makes sense, and they support the use of local frequency coordination committees as a reliable clearinghouse for area frequency use information. Fisher specifically endorses the use of local frequency coordination committees and adds that in Seattle and Portland local coordination is an ongoing process which to date has been quite successful. With respect to frequency selection, CBS would require applicants to make a reasonable search of other auxiliary licensees in an area and the frequencies assigned to those licensees. CBS states that the approval and recommendation of certain frequencies by a local coordinating committee should be considered *prima facie* evidence of reasonableness. In an effort to facilitate local frequency coordination, several parties suggest that the Commission establish and make available a nationwide auxiliary frequency data base, with users reimbursing the Commission for costs.

42. Although the noncommercial licensees filing jointly do not oppose local frequency studies by prospective licensees, they do object to giving local coordination committees any authority to assign frequencies or resolve disputes. According to these licensees, such committees are susceptible to local political pressures that could conceivably affect their impartiality. Another group of noncommercial licensees (Schwartz) opposes giving local committees any authority. Schwartz asserts that the Commission should not shirk its statutory responsibilities nor abdicate its essential licensing role. Cox argues that the FCC must retain an active role in frequency assignment and coordination. Citing Sections 303(a)-(d) of the Communications Act of 1934, as amended, Cox contends that the Commission is obligated to assign frequencies and locations in the public interest. Cox maintains that our proposals give local frequency coordination committees too much power. Instead, local committees should be limited to providing information. Cox suggests that any rule adopted should emphasize that the role of local coordination committees is advisory and that the Commission has ultimate authority to assign frequencies.

43. *Discussion.* After carefully reviewing the comments, we continue to believe that local frequency coordination remains the most efficient process for licensees to select appropriate television

auxiliary frequencies. The Commission simply does not have the resources to coordinate every auxiliary application submitted, and the comments contain no implications that this system of local frequency coordination has created any problems for licensees. However, in light of the fears expressed by some parties over the authority we proposed to give local coordination committees, we will modify slightly the rules which we initially proposed. First, we will not include in new Section 74.602(b) any reference to who may perform a frequency coordination study. Instead, we merely have added a requirement that applicants for auxiliary frequencies comply with the frequency selection provisions of Section 74.604 of the Rules. Applicants must also affirm that the requested frequency will cause no interference to existing users in the area. Section 74.604, which deals with frequency selection to avoid interference, indicates that frequency selection is the primary responsibility of the applicant. This section does permit an applicant to consult a local frequency coordination committee where one exists, but such consultation is at the option of the applicant. Section 74.602(b) makes it clear that the Commission has ultimate licensing authority and that frequencies other than those requested will be assigned if the Commission deems such action appropriate.

44. This system guarantees that area licensees will retain great flexibility in the way they handle their frequency coordination matters. In areas where committees exist and function effectively, coordination of additional auxiliary authorizations should be as simple as consulting a master file of those frequencies already in use in the area.[16] Where committees do not exist, or where a particular applicant chooses not to work with an existing committee, the licensee must take it upon himself to select a frequency that will cause no interference to other users. Whichever procedure is utilized, it is clear that the Commission retains the ultimate licensing authority and may reject the request for a particular frequency if such action is warranted.

45. With respect to the idea that a nationwide auxiliary frequency data base be established to facilitate frequency coordination, the Commission at this time does not have the resources to make such information widely available. We are in the process of expanding and updating our master frequency data base. Public access to this data base has been and will continue to be available. Concerning regional coordination, if broadcast auxiliary service coordination committees advise us as to the markets or areas they serve and provide us with information concerning their name, address, telephone number, principal staff members, geographic area, participat-

[16] We note that private frequency coordination has worked well in the private radio service for many years. Indeed, the authority given to frequency coordinating committees in the private radio service is at least as extensive as the advisory role contemplated for such committees in this proceeding.

ing broadcast stations, and spectrum coordinated, we will attempt to make this information available to other broadcasters or spectrum users.

46. *Interference Protection and Channel Priorities—The Comments.* Recognizing that no system of frequency coordination is foolproof, we stated that some mechanism should be established to settle those few cases in which existing stations cause interference to one another. In response to our proposals concerning the resolution of interference disputes, several commenters opine that such disputes are handled better at the local level. For example, NAB suggests that any interference dispute mechanism adopted by the Commission should be flexible enough to take account of local procedures instituted by area coordination committees. The Ohio Educational Broadcasting Network Commission agrees that local coordination committees are the proper forum for resolving interference problems and states that in the past interference has been resolved through a "limited number of telephone calls among television chief engineers."

47. With respect to our proposed priority scheme for interference protection, most parties support the priority concept and agree that STLs and CARS stations should be afforded highest priority in terms of protection from interference. However, virtually every noncommercial licensee addressing this issue urges that intercity relay stations receive a similar priority. They reason that ICRs perform the exact same function as STLs in that they provide a "life blood" link from a central production center to noncommercial stations throughout the state. CBS and Cox argue that, because STLs are essential to maintaining a reliable signal to the public, STL backup facilities should be given the same priority as the primary STL facility. CBS states that backup facilities must be free of interference when used and that a lower priority endangers a backup's reliability while increasing the risks of interruption. Cox submits that auxiliary facilities for low power television stations should receive a lower priority than backup facilities for full service stations. Cox avers that this is consistent with the secondary status of the low power service. NBC adds that at least some provision should be made for activating backup facilities on a first priority basis if the primary facilities fail.

48. Several other suggestions were offered with respect to our interference resolution procedures. Hughes would grant second priority to all other fixed links in regular use, third priority to mobile facilities of all kinds, and fourth priority to back-up facilities. PBS suggests giving priority to all existing services over new entrants. NBC states that when ICRs and television pickups operate together to produce news material, the pickup frequency should acquire the same priority as the ICR. The Ohio Educational Broadcasting Network Commission and a group of noncommercial licensees indicate that mobile facilities present the greatest potential

for interference. The noncommercial licensees urge that mobile facilities should not be authorized to operate on frequencies used by STLs within the STL's geographic area. The Ohio Commission asserts that the obligation to correct interference should rest with mobile users in disputes between mobile and fixed services. Finally, Cox and CBN state that a final priority should be added to the list indicating that non-broadcast uses of auxiliary facilities have the lowest priority with respect to interference disputes.

49. In addition to providing a mechanism for resolving interference disputes between existing stations, the priority list we proposed also was to be used as a guide for withdrawing channels in a given area. If no additional channels are available in a market, we stated that we would withdraw authorizations being utilized for low priority purposes in order to provide licensees with channels for a higher priority use. In deciding which channels to withdraw, we stated that we would take into consideration the number of channels authorized to individual licensees. Those licensees with the most channels would be more likely to lose an authorization. We also proposed to consider the recommendation of a local coordination committee as to which channel to withdraw in an area. These proposals came under sharp attack from two noncommercial commenters, Schwartz and the WGBH Educational Foundation ("WGBH"). Schwartz states that forcing existing licensees to terminate operations that conflict with proposed higher priority uses clearly is inefficient and patently unfair. Lower priority users then will be forced to seek alternative frequencies, leading to investment instability and uncertainty. This scenario will deter the operation of lower priority facilities which, Schwartz opines, is antithetical to the public interest. Schwartz suggests a requirement that higher priority users compensate and underwrite the continuation of any lower priority service forced to relinquish the use of its channel. WGBH states that existing microwave systems are fundamental to public broadcasting. WGBH asserts that deleting channels from the licensee holding the most channels ignores the reality that licensees covering the entire state are apt to have the most assignments. Further, elimination of existing microwave relays would damage WGBH by loss of capital investment and would leave it without an economically feasible alternative. As a result, WGBH claims that proven broadcast service would be traded for unproven new services such as STLs for low power television stations. WGBH concludes that the Commission should recognize the importance of microwave systems to educational broadcasting by preserving the priority of existing microwave networks.

50. *Discussion*. Based on the comments of the parties, we have decided to make a number of changes in the interference protection and channel withdrawal mechanisms proposed in the *Notice*. Briefly, the priority system we are adopting will apply only to those

complaints brought to the Commission for resolution. Individual licensees acting together either on an *ad hoc* basis or through a formal coordinating committee may adopt whatever interference resolution procedures they choose. Also, the actual priority listing we are adopting is more simplified than the proposed set of priorities. Finally, we have decided against adopting any formal channel withdrawal mechanism. The following paragraphs explain these decisions more fully.

51. In the *Notice*, we stated that local frequency coordination of new authorizations should eliminate the possibility of harmful interference. In the unlikely event that licensed stations did cause interference, we felt that some mechanism should be in place for resolving those disputes. To this end, we proposed a priority system for interference protection. In fashioning our proposed channel priorities, we asked for comment on the possibility of allowing local frequency coordination committees to set their own standards. We believe that resolving interference disputes at the local level should be encouraged. Those licensees who addressed the issue indicate that local procedures are effective and that eliminating interference often can be as easy as making a few well-placed telephone calls. We therefore see no reason to impose on all licensees a rigid interference resolution mechanism that may be inappropriate for local needs and conditions. Accordingly, licensees who choose to act together to resolve interference disputes will be afforded the utmost discretion. This decision complements our determination to leave initial frequency coordination at the local level. With respect to resolving interference disputes, the interference resolution priority system described below will be utilized only when the affected parties cannot agree among themselves and petition the Commission.

52. While most parties support the creation of an interference protection priority system, there is some disagreement on the actual prioritizing of the various broadcast auxiliary services. In an effort to make our priority system more equitable and easier to administer, we have simplified the priority listing. First priority will be given to all fixed link stations that serve full service broadcast stations and cable systems. This includes STLs, CARS links, and intercity relays. We have taken this action primarily for the reasons expressed in the comments by the noncommercial entities. Regardless of the label placed on fixed links, if the practical use of the links essentially is the same, we see no reason to distinguish between the stations.[17] Second priority for the purpose of resolving interference disputes will be accorded television pickup stations utilized in a licensee's

[17] We recognize that by lumping all fixed links together, we may be including some links that do not perform "life blood" functions, but for administrative convenience we choose not to attempt to subcategorize every conceivable fixed link use. Should a dispute arise involving a non-essential fixed link station, we can certainly take that fact into account in resolving the dispute.

local service area. We will also include cable television relay service pickup stations because the services share the same frequencies and have similar purposes. Third priority belongs to translator relay stations and those links used to feed low power television stations. This priority is appropriate for translators and low power stations as it recognizes that these services are secondary to full service broadcast stations.[18] Fourth priority will be given to backup facilities and television pickup stations operating outside a licensee's local service area. Although several commenters argued strenuously that backup facilities should be given the same priority as primary facilities, we conclude that the present crowding of the spectrum does not allow us the luxury of providing each licensee with two or more high priority fixed link authorizations.[19] The final and lowest priority is given to the transmission of material during times when the station is not being used to transmit program material to its associated broadcast station. Thus, the expanded uses of auxiliary facilities, which we discussed in Section II of this decision, are accorded secondary status and must always give way to *bona fide* broadcast transmissions. Disputes involving stations in the same priority category will be resolved in favor of the licensee that has held its authorization on a particular path the longest.

53. The establishment of these priorities should address adequately many of the concerns advanced by the commenting parties. For example, several parties indicate that mobile facilities present the greatest interference threat. The noncommercial licensees filing jointly suggest that mobile facilities should not be authorized to operate on frequencies used by STLs within the STL's geographic area. The priority system we have devised makes it clear that mobile facilities must yield to fixed links when interference is present. Yet, this system retains the flexibility necessary for the efficient functioning of television pickup stations. Many television pickups are

[18] In some cases, translators may be providing a network service otherwise not available in an area. In those instances, it may be argued that the translator relay providing the network feed is a higher priority than, for example, a third or fourth TV pickup for a full service station in the area. We intend to remain flexible in our administration of the priority system so that such conflicts can be resolved equitably. Similarly, a fixed link providing a "life blood" service to a low power television station might also, in a given situation, be considered a higher priority than additional pickups for a full service television station. We are confident that most disputes concerning such conflicting uses will be resolved locally. However, if a situation does arise where a low power station is not able to function because of an inability to acquire an auxiliary link, we will give expedited treatment to any request for relief brought to our attention.

[19] Of course, backup facilities providing "hot standby" on the same frequency as the primary transmitter would assume the same priority by virtue of its operating on the same frequency. Also, we recognize that several areas of the country at times experience atmospheric inversions that necessitate using alternate frequencies. We encourage licensees in such areas to come to their own agreements regarding the priority that should be given to alternate facilities in those situations.

authorized on multiple frequencies to take advantage of frequency-agile transmission equipment. It would be impractical to force broadcasters to refrain from using those frequencies in situations where interference is not likely to occur as, for example, when a news crew operates outside the local market. Adopting the position of the noncommercial licensees would foreclose this flexibility.

54. After careful consideration, we have decided not to implement the channel withdrawal procedures proposed in the *Notice*. We believe that summarily withdrawing an existing authorization would have a destablizing effect on the industry and would create legal and practical problems that far outweigh any countervailing benefits. Accordingly, we will leave questions of possible channel withdrawal to local determination in the context of initial frequency coordination for new channels. As previously stated, we believe that frequency coordination matters are handled best at the local level, either by the individual applicant or through a local coordination committee. Should a case arise where existing usage in a market precludes additional uses on a particular frequency, we believe that the parties involved are well situated to come to a reasonable accommodation. If a new entrant desires the use of an unavailable frequency, the new user could negotiate with existing users for relief that could take a variety of forms, including channel sharing or offering to reimburse an existing licensee for the expenses necessary to move to another channel.[20] As we stated in the *Notice*, we do not anticipate the spectrum becoming so crowded that an existing authorization will have to be withdrawn permanently from one licensee to accommodate another licensee's use. Nonetheless, should such a situation arise, we prefer giving the parties directly involved in the matter the flexibility to fashion the most appropriate and reasonable solution possible. Our decision not to apply a rigid set of channel priorities to such disputes gives the affected licensees that necessary flexibility. Of course, in those instances when the parties cannot agree, the Commission retains the authority to take whatever action is necessary to resolve the situation.

55. *Miscellaneous Amendments.* Two proposed rule changes suggested in the *Notice* received little or no comment. The first involved our proposal to end our present limitations on the number of channels any one licensee may obtain. As a practical matter, the restrictions have not been followed in recent years, and in the absence of comments opposing this change, we will amend our rules to reflect our actual practice. A second change in the rules would limit fixed link services to single frequency authorizations. No party

[20] The Commission long has recognized the properity of one licensee reimbursing another for changes in operating frequency when such changes permit the initiation of additional services. This concept is particularly useful in the area of FM and television assignments. *See, e.g., Circleville, Ohio*, 8 F.C.C. 2d 159, 163–64 (1967).

commented on this amendment, and we will adopt it as proposed in order to maximize the efficient use of the spectrum. Finally, because the priority system adopted today has more to do with the avoidance of interference than frequency assignment, we are placing the interference resolution procedures in Section 74.604 rather than 74.602 as originally proposed. We are also making an editorial change in the title of Section 74.604 to conform the title to the new addition.

V. *Conclusion*

56. The actions taken today serve to deregulate substantially the television broadcast auxiliary service. By allowing licensees to utilize the excess capacity heretofore unused, we are promoting the efficient use of the increasingly crowded spectrum and giving licensees an additional revenue generating opportunity. This is important especially for noncommercial licensees faced with cutbacks in federal financial support. Our decision recognizes that in appropriate circumstances, the marketplace is an effective substitute for government regulation, and that market forces should be allowed to operate freely when possible. This concept also is evident in our revised licensing procedures, which acknowledge that individual licensees working together can act efficiently and expeditiously to assure their common interests. As broadcast operations become more efficient and the costs associated with government regulation are reduced, licensees can direct more resources to serving television consumers. Thus, the viewing public is the ultimate beneficiary of our actions.

57. *Regulatory Flexibility Act Final Analysis.* The action taken in this proceeding significantly deregulates the use of television broadcast auxiliary stations by expanding their permissible uses and allowing licensees to generate additional revenues by sharing excess capacity with other users. The amendments to our auxiliary station licensing policies for the most part conform the rules to existing Commission practice and do not constitute a substantive change in policy. Greater emphasis on local frequency coordination and interference resolution gives licensees greater flexibility in the conduct of their affairs and substantially reduces the government's presence in this area. These actions may benefit the approximately 900 Commission licensees currently holding broadcast auxiliary authorizations.

58. No party participating in this proceeding raised any regulatory flexibility issues. With minor exceptions, the rules are being adopted essentially as proposed. Those significant options not adopted are options which, in the judgment of the Commission, are more burdensome than necessary to meet our established objectives. Such options would either increase the burdens on licensees without

any corresponding public benefit or result in unnecessary Commission oversight of licensee conduct.

59. Accordingly, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective May 23, 1983, Part 74 of the Commission's Rules IS AMENDED as set forth in Appendix A.

60. IT IS FURTHER ORDERED, that subject to approval by the Office of Management and Budget, FCC Form 313 IS AMENDED as set forth in Appendix B.

61. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

62. For further information concerning this proceeding, contact Michael A. McGregor, Mass Media Bureau, (202) 632–7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

Part 74 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 74.601(a), (b), (c), and (d) are amended as follows:

Section 74.601 Classes of TV broadcast auxiliary stations.

(a) *TV pickup station.* A land mobile station used for the transmission of TV program material and related communications from scenes of events occurring at points removed from TV broadcast station studios to TV broadcast or low power TV stations or other purposes as authorized in Section 74.631.

(b) *TV STL station (studio-transmitter link).* A fixed station used for the transmission of TV program material and related communications from the studio to the transmitter of a TV broadcast or low power TV station or other purposes as authorized in Section 74.631.

(c) *TV relay station.* A fixed station used for transmission of TV program material and related communications for use by TV broadcast and low power TV stations or other purposes as authorized in Section 74.631.

(d) *TV translator relay station.* A fixed station used for relaying programs and signals of TV broadcast stations to LPTV, TV translator, and to other communications facilities that the Commission may authorize or for other purposes as permitted by Section 74.631.

* * * * *

2. Section 74.602(b), (c), (d), (e), and (g) are amended as follows: Section 74.602 Frequency assignment.

* * * * *

(b) Subject to the conditions of paragraph (a) of this Section, frequency assignments will normally be made as requested, provided that the frequency selection provisions of Section 74.604 have been followed and that the frequency requested will cause no interference to existing users in the area. The Commission reserves the right to assign frequencies other than those requested if, in its opinion, such action is warranted.

(c) Fixed link stations will be authorized to operate on one channel only.

(d) (reserved)

(e) (reserved)

(f) * * *

(g) In the event that a TV broadcast station licensee engages a communications common carrier to provide TV pickup or TV STL service, the frequencies available to the licensee may be assigned to the communications common carrier for the purpose of providing such service to that licensee.

* * * * *

2. Section 74.604 is amended as follows:

Section 74.604 Interference avoidance.

(a) Because the Commission does not undertake frequency coordination, applicants for new TV broadcast auxiliary authorizations are responsible for selecting the frequency assignments that are least likely to result in mutual interference with other licensees in the same area. Applicants may consult local coordination committees, where they exist, for information on frequencies available in the area. In selecting frequencies, consideration should be given to the relative locations of receiving points, normal transmission paths, and the nature of the contemplated operation.

(b) Where two or more licensees are assigned a common channel for TV pickup, TV STL, or TV relay purposes in the same area and simultaneous operation is contemplated, they shall take such steps as may be necessary to avoid mutual interference, including consultation with the local coordination committee, if one exists. If a mutual agreement to this effect cannot be reached, the Commission must be notified and it will take such action as may be necessary, including time sharing arrangements, to assure an equitable distribution of available frequencies.

(c) For those interference disputes brought to the Commission for resolution, TV broadcast auxiliary channels will have the following priority for purposes of interference protection:

(1) All fixed links for full service broadcast stations and cable systems.

(2) TV and CARS pickup stations.

(3) Fixed or mobile stations serving translator or low power TV stations.

(4) Backup facilities; TV pickup stations used outside a licensee's local service area.

(5) Any transmission, pursuant to §74.631(f), that does not involve the delivery of program material to a licensee's associated TV broadcast station.

(d) Interference between two stations having the same priority shall be resolved in favor of the station licensed first on a particular path.

3. Section 73.631(d), (f), and (h) are amended as follows:

Section 74.631 Permissible service.

* * * * *

(d) The transmitter of an STL, TV relay station or TV translator relay station may be multiplexed to provide additional communication channels. A TV broadcast STL or TV relay station will be authorized only in those cases where the principal use is the transmission of television broadcast program material for use by its associated TV broadcast station. However, STL or TV relay stations so licensed may be operated at any time for the transmission of multiplexed communications whether or not visual program material is being transmitted, provided that such operation does not cause

harmful interference to TV broadcast pickup, STL or TV relay stations transmitting television broadcast program material.

* * * * *

(f) A TV broadcast pickup, STL, or TV relay station may be used for the transmission of material to be used by others, including but not limited to other broadcast stations, cable television systems, and educational institutions. This use shall not interfere with the use of these broadcast auxiliary facilities for the transmission of programs and associated material intended to be used by the television station or stations licensed to or under common control of the licensee of the TV pickup, STL, or TV relay station. This use of the broadcast auxiliary facilities must not cause harmful interference to broadcast auxiliary stations operating in accordance with the basic frequency allocation, and the licensee of the TV pickup, STL, or TV relay station must retain exclusive control over the operation of the facilities. Prior to operating pursuant to the provisions of this Section, the licensee shall, for the intended location or area-of-operation, notify the appropriate frequency coordination committee or any licensee(s) assigned the use of the proposed operating frequency, concerning the particulars of the intended operation and must provide the name and telephone number of a person who may be contacted in the event of interference.

* * * * *

(h) TV broadcast auxiliary stations authorized pursuant to this subpart may additionally be authorized to supply programs and signals of TV broadcast stations to cable television systems or CARS stations. Where the licensee of a TV broadcast auxiliary station supplies programs and signals to cable television systems or CARS stations, the TV auxiliary licensee must have exclusive control over the operation of the TV auxiliary stations licensed to it. Contributions to capital and operating expenses may be accepted only on a cost-sharing, non-profit basis, prorated on an equitable basis among all parties being supplied with program material.

4. Section 74.632(a) is amended as follows:

Section 74.632 Licensing requirements.

(a) A license for a TV pickup, TV STL, or TV relay station will be issued only to licensees of TV broadcast stations and, on a secondary basis, licensees of low power TV stations. A separate application is required for each fixed station and the application shall be specific with regard to the frequency requested. A mobile station license may be issued for any number of mobile transmitters to operate in a specific area or frequency band and the applicant shall be specific with regard to the frequencies requested. In lieu of specifying specific transmitter types, applicants shall certify that the transmitter used or to be used at the requested facility is type accepted, or was manufactured before October 1, 1981. Applications for consolidation of individual mobile station licenses into a system license will be accepted only at the time application is made for renewal of the main (Part 73) station license.

* * * * *

Appendix B

1. Form 313, Application for Authorization in the Auxiliary Radio Broadcast Service, is amended by adding the following three questions:

* * * * *

17. Describe briefly the primary broadcast-related purpose of the requested authorization.

18. For television auxiliary stations, state the anticipated percentage of time for which the station will be used for secondary uses. Secondary uses are transmissions of

material at times when the station is not being used to transmit program material to its associated broadcast station.

19. For television auxiliary licensees, list the total number of existing auxiliary authorizations and indicate the combined percentage of time for which these stations are presently used for secondary uses.

CONCURRING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: *Report and Order* Authorizing Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities (BC Docket 81–794).

I concur in this *Report and Order* because it provides useful operational and licensing flexibility, and promotes spectrum efficiency. However, I am disturbed by our failure to adopt quantitative standards limiting the degree to which these substantial blocks of spectrum can be used for non-broadcast purposes. The Commission was also unwise not to acknowledge that restricting licensing eligibility to broadcasters only may be questionable policy.

With respect to the first point, I would have preferred a rule precisely limiting the extent to which broadcast auxiliary authorizations can be put to non-broadcast use. Although the application form adopted by the Commission[1] and associated discussion[2] are designed to prevent *de facto* spectrum reallocation, without clear standards that situation will be extremely hard to detect. This is unfortunate because it is a core function of this Commission to ensure adequate spectrum for existing and emerging communications needs.

As for the eligibity issue, if the Commission is going to allow mixed use in these bands, there is no apparent compelling public policy reason to limit licensing eligibility to broadcasters in all cases. Broadcasters should be able to count on designated spectrum to meet legitimate auxiliary needs, and should have the flexibility to sell excess capacity, but I am uncomfortable with the fact that in markets with substantial dormant spectrum, broadcasters alone will be able to control access to such spectrum by others. Without standards to assess multiple applications for auxiliary spectrum, it will be rather easy for broadcasters to reap a substantial and unwarranted windfall by selling fallow spectrum to parties not eligible to hold these authorizations themselves. The Commission should keep a watchful eye so that it can respond if these concerns are borne out in practice.[3]

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[1] *See* Appendix B.

[2] *See Report and Order* paras. 13–14.

[3] The Commission will be in a position to (and should) refine its approach to these matters in Docket 82–334, *In re Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services' Use of Certain Bands Between 947 MHz and 40 GHz*, released Jan. 13, 1983.

Common Carrier, Interconnection, Connecting Arrangements
Common Carrier, Operating Expenses
Subsidiary Company

Report and Order adopted concerning the operations of AT&T's separate subsidiary and the manner in which it relates to unseparated affiliates.
–AT&T Co.

FCC 83–123

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Matter of	
American Telephone and Telegraph Company	
Request for approval to supplement the capitalization of American Bell Inc. to provide new customer premises equipment	
Plan for reporting interim expenses pursuant to FCC Second Computer Inquiry order	
Computer and Business Equipment Manufacturers Association	
Petition to Amend Part 64 of the Rules to establish certain procedural requirements applicable to implementation of Second Computer Inquiry	RM 3894
Petition for Policy Ruling: AT&T revisions to Tariff FCC No. 260 to offer the ComStor* II communications storage unit	Transmittal No. 1367
Michigan Independent Communications Association	
North American Telephone Association	
Petition for Declaratory Ruling	

REPORT AND ORDER

(Adopted March 31, 1983; Released April 13, 1983)

BY THE COMMISSION:

I. *Introduction*

1. On November 4, 1982, the Commission adopted an order

approving the further capitalization of American Bell Inc. (ABI) by the American Telephone and Telegraph Company (AT&T) to enable it to provide new customer premises equipment (CPE) on an unregulated basis. *Request for Approval to Supplement the Capitalization of American Bell Inc. to Provide New Customer Premises Equipment*, FCC 82–496, released November 10, 1982 (*CPE Order*). In the *CPE Order*, the Commission addressed issues related to the entry of ABI in the competitive marketplace including its structural framework and its relationship to other AT&T entities. The Commission also ordered AT&T to revise the implementation of certain operating and accounting aspects of the CPE capitalization plan in a manner consistent with the Computer II rules and policies.[1] ABI began offering CPE to the public on January 1, 1983.

2. This order first adopts the findings and recommendations of the attached staff reports concerning AT&T's plans for compliance with structural separation conditions and AT&T's treatment of preoperational expenses. This order also reports on our review of AT&T's plans for the accounting and operation of the BOCs' provision of installation and maintenance services to ABI's business systems operations. We also reject AT&T's plan for allocating a portion of fundamental research costs to the subsidiary. *See* letter by AT&T to Chief, Common Carrier Bureau dated July 16, 1982. Finally, we dispose of various other pleadings and proceedings related to the entry of ABI into unregulated markets.

II. *Staff Reports*

3. The first of the attached reports prepared by the staff addresses AT&T's structuring of ABI and its interaction with affiliates. *See Report on Compliance with FCC Requirements for Structural Separation Between AT&T and American Bell Inc.* (Appendix A). The second staff report addresses AT&T's treatment of the amounts spent for preoperational subsidiary formation and CPE development efforts. *See Review of CPE Preoperational and Subsidiary Formation Expenses* (Appendix B). We note that as a result of the staff's audit, over $18,000,000 of additional preoperational expenses have been identified for potential reimbursement to ratepayers. *See Appendix B*, para. 69. We hereby adopt the findings and recommendations of both staff reports and require AT&T to complete the process of implementing Computer II separation requirements.

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981) *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

On June 10, 1982, the Commission had approved AT&T's unregulated offer of enhanced services. *See* Request for Approval to Capitalize a Separate Subsidiary to Provide Enhanced Services, 90 FCC 2d 404, 430 (1982) (*Enhanced Services Order*).

4. As demonstrated by the staff's report on AT&T's plans for the operation of ABI, areas requiring special attention include:

a) AT&T's revision of employee training to reflect Computer II limitations on joint software development (Appendix A, para. 19);

b) Completion of all Bell System Computer II training within 30 days of the release date of this order (Appendix A, para. 9);

c) Further review of information flow activities in Western (Appendix A, para. 19);

d) Maintenance of information disclosure records by BTL data base administrators (Appendix A, para. 31); and

e) Consolidation of ABI technical staff located in facilities housing BTL staff and a June 30, 1983 AT&T report to the Common Carrier Bureau on that consolidation. (Appendix A, para. 37).

As demonstrated by the staff's report on its review of AT&T's treatment of preoperational expenses, areas meriting further attention include:

a) Review of AT&T responses to BDPs selected by staff as at least partially reportable but previously unreported by AT&T (Appendix B, paras. 34–44);

b) Further examination of BDPs in departments with subsidiary formation responsibility to determine the extent of charges made to reportable formation BDPs (this would include the General Departments tax, legal and ASD departments at a minimum) (Appendix B, para. 26);

c) Analysis of Business Services and Business Marketing (General Departments 25 and 26) to separate administrative expenses (Appendix B, paras. 70–72);

d) Completion of staff review of non-license contract billings that appear to be related to CPE development or subsidiary formation (Appendix B, paras. 8 and 59)

e) Reconciliation of license contract billings through December 31, 1981 to AT&T general books, and development of the extent to which preoperational and formation expenses were excluded from license contract billings (Appendix B, para. 8)

f) Testing components of General Departments overhead pools for potential direct preoperational expenses, and verification of allocation algorithms used to distribute overheads (Appendix B, para. 8);

g) Examination of subsidiary formation expenses identified by BTL, but not yet included in para. 105 reports (Appendix B, para. 67);

h) Testing of New York Telephone Company for expenses reported and the extent of subsidiary formation efforts. (Appendix B, paras. 13 and 21); and

i) Review of 1982 expenses not yet reported by AT&T.

III. *Installation and Maintenance*

5. In the *Further Reconsideration* of Computer II, we provided for a limited waiver of Section 64.702 of the Commission's rules so that the BOCs could provide installation and maintenance services

for ABI business CPE until June 30, 1984. 88 FCC 2d 512, 532-33 (1981). At our direction, AT&T filed its January 13, 1982 plan for the accounting and operational changes which AT&T would institute to capture all direct and indirect costs associated with the provision of installation and maintenance support by the BOCs for ABI and to properly bill ABI for such costs. After a thorough review of that plan and additional information provided by AT&T at staff request, the Bureau, pursuant to delegated authority, approved the plan, subject to certain modifications. *See* letter from Chief, Common Carrier Bureau to Alfred A. Greene (July 26, 1982).

6. AT&T's plan identified accounting and operational changes and changes to existing computer programs that it would institute to ensure that all direct and indirect costs would be billed to ABI. AT&T's plan provided for charging indirect costs by establishing overall loading rates for overhead expenses and small-value repair parts. AT&T also outlined certain reports that would be filed and procedures that would be followed by BOC craftpersons so that sufficient information was entered into AT&T computers to properly bill ABI for work performed on its behalf.

7. A key factor which led the Bureau to approve AT&T's plan was the ability of the staff to audit the amounts billed to ABI. Staff audit plans include the use of computerized facilities to analyze data for both ABI and BOC jobs to determine whether ABI bears costs which are similar to those incurred by the BOCs with respect to the embedded equipment. In order to facilitate the staff's review of computer data concerning ABI and BOC installation and maintenance jobs, the Chief of the Common Carrier Bureau directed AT&T to ensure that similar information was collected for both ABI and BOC work. The Chief further directed AT&T to provide the Commission with specific information needed to monitor the billing process of ABI and to protect ratepayers from bearing costs associated with the provision of competitive equipment. *See* letter from Chief, Common Carrier Bureau to Alfred A. Greene (December 16, 1982); letter from Chief, Common Carrier Bureau to Daniel J. Culkin (February 18, 1983). In addition to the audit of the billing process, the staff will monitor the craftspersons' reporting of the data necessary to properly bill ABI, examine historic BOC installation and maintenance data as a benchmark from which to compare costs billed to ABI, and examine the appropriateness of the computations AT&T makes in determining overhead and repair parts loading rates. The staff is directed to continue its monitoring of cost allocations and the billing process during the transitional installation and maintenance waiver period.

IV. *Allocation of Fundamental Research*

8. In the *Enhanced Services Order* at 422-23, the Commission directed AT&T to file a plan for allocating a portion of fundamental

research to preoperational expenditures attributable to the subsidiary. On July 16, 1982, AT&T responded with a proposal calling for the use of a composite allocator to determine these expenses. The composite allocator proposed by AT&T is comprised of the average which the proportions of assets, revenues, expenses, and employees of the subsidiary bear to those of all AT&T affiliates sharing the expense. *See Memorandum Opinion and Order*, 90 FCC 2d 184, para. 50 (1982). In addition, AT&T proposed to use the composite allocator to detemine what portion of the costs of fundamental research should properly be attributed to ABI in the future. *Enhanced Services Order*, para. 57. It proposed to begin to allocate fundamental research during the first six months of ABI operations.

9. We are very much aware of the substantial contributions to scientific development, and to telecommunications technology in particular, which Bell Telephone Laboratories has made over the years. The Commission is concerned that fundamental research remain healthy through this period of transition in AT&T's structure. The Commission is not willing, however, to permit a disproportionate share of the cost of that research to be assigned to the rate regulated portion of AT&T's business.

10. AT&T's approach to allocating a portion of the cost of fundamental research to ABI is inappropriate. During ABI's early period of operation, it will be very much smaller than the other AT&T affiliates in size of investment, number of employees and amount of revenues. It could be expected that ABI, created in part to permit AT&T to enter new markets with new products and services, would gain a benefit from current research activities disproportionate to its payment for those activities if the composite allocator were used. A composite allocator based on figures generated in ABI's start-up phase would be unlikely to allocate to ABI its fair share of fundamental research expenditures. A disproportionate share would fall on the ratepayers if this method were to be used.

11. A better method of ensuring a proper allocation of BTL fundamental research would be to follow the approach which AT&T has used to allocate fundamental research costs to the BOCs and Long Lines. Fundamental research is currently allocated to the BOCs and Long Lines on the basis of each entity's share of BTL billings for non-fundamental Research and Systems Engineering (R&SE) work.

12. As the Commission noted in the *Enhanced Services Order*, the benefits of fundamental research are often untraceable and unquantifiable. Fundamental research, however, clearly benefits the whole corporate enterprise. We shall assume, therefore, for purposes of allocating the cost of fundamental research, that research produces definite future benefits in knowledge gained as well as in the development of new or improved services and products. We shall also assume that each of the classes of specific R&SE work done at

BTL shares proportionately in the benefits of BTL's fundamental research.

13. Data compiled from the AT&T Annual Report of License Contract Services and Costs, prepared at the request of the NARUC Staff Committee on Accounting (Grey Book), can be used to compute an appropriate share of fundamental research for ABI. Two of the BTL billing categories in the Grey Book, Business Communications Systems (PBXs) and Station Research and Systems Engineering (Station Apparatus), clearly involve work for CPE which will only be sold by ABI. ABI's share of fundamental research ("General Research and Systems Engineering" in the Grey Book), therefore, should bear the same relationship to total fundamental research as the two CPE-related categories bear to the total BTL R&SE expenditures other than fundamental research. The Commission staff computed a four year average (1978-81) for each of the BTL billing categories in the Grey Book. Adding the PBX and Station Apparatus categories and taking them as a percentage of total BTL R&SE expenditures other than fundamental research, we find that ABI's share of fundamental research should be approximately 16.6% for 1981. A similar calculation can be made for that portion of 1980 subject to preoperational expense reporting and for 1982. For 1980, the average should be computed for the years 1977-80. For 1982 the average should be computed for the years 1979-82.[2]

14. This computation is based on two conservative assumptions. First, the percentage was calculated using the two categories of work most clearly attributable to ABI. The actual amount of work done at BTL for ABI's benefit was, in fact, larger than just those two categories.[3] If the percentage were based on all actual work performed rather than just these two major categories, the percentage attributable to ABI would be higher. Second, the percentage was calculated using average numbers for a four year period. Over that four year period, however, the amounts attributable to PBXs and Station Apparatus have been steadily increasing relative to the total.

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[2] The Grey Book for any one year is usually available by April or May of the following year. The 1982 Grey Book figures should be available by April or May of 1983. Due to AT&T's restructuring as a result of Computer II and divestiture, it is not known whether or in what form the license contract may continue after 1983. The Commission has under consideration the license contract and other similar intrasystem arrangements in CC Docket 80–742, In the Matter of License Contract Arangements and Other Intrasystem Arrangements of the Major Telephone Systems.

[3] Moreover, these two categories include only CPE. This calculation includes no amount for enhanced services research and systems engineering. Enhanced services development in the preoperational period constituted only a very small part of the total research and systems engineering effort. Omitting it from the calculation of ABI's share of fundamental research will not result in any significant understatement of that share. For 1984 and beyond, however, any calculation of ABI's share of fundamental research should consider enhanced services as well as CPE developmental efforts.

In 1981, these categories accounted for approximately 20% of total BTL billings exclusive of fundamental research. By using average figures for a four year period, ABI's allocated share of fundamental research will be somewhat smaller than if the calculation were based on only the most recent year.

15. We believe, however, that these assumptions are justifiable. As to the first assumption, although the PBX and Station Apparatus categories do not include all work benefitting ABI in the preoperational period, they encompass a very large part of it. Limiting the computation to these two categories greatly simplifies the calculation.

16. As to the second assumption, the appropriateness of basing the computation on a four year average rather than using current year figures alone, we have already noted that the results of basic research are often unquantifiable and untraceable. An average based on several years, we believe, is more likely to be a fair reflection of future benefits of fundamental research than would be a computation based on a single year.

17. We, therefore, direct AT&T to attribute a portion of fundamental research to ABI for each of the years subject to preoperational expense reporting according to the method described above. We also direct AT&T to use the same method to allocate a portion of fundamental research to ABI for 1983.

18. We stress that this method for allocating a portion of BTL fundamental research costs to ABI is transitional only. The restructuring of the Bell System expected to take place early in 1984 will require modification of that method or the adoption of an entirely different method. In particular, the license contract billings, summarized in the Grey Book, will be phased out. The method of allocating fundamental research costs to ABI, therefore, will need to be revised. The Commission will consider this issue during 1983. AT&T should file with the Commission staff no later than May 31, 1983 any proposals it wishes the Commission to consider as to how those costs should be allocated in the future. Furthermore, we direct AT&T to continue to make available to the Commission the types of information, presently summarized in the Grey Book, on which any future allocation of fundamental research might be based.

V. *Additional Matters*

19. On March 25, 1981 a Public Notice invited public comment on the preoperational expense reporting plan which AT&T had attached to its January 29, 1981 Paragraph 105 Report. This order's adoption of the findings and recommendations of Appendix B, along with the *Enhanced Services Order* and the *CPE Order* dispose of all the issues raised by the comments filed in response to that public notice. Accordingly, we terminate that proceeding.

20. On April 24, 1981, the Computer and Business Equipment

Manufacturers Association (CBEMA) filed a pleading entitled Petition for Policy Ruling: AT&T Revisions to Tariff FCC No. 260 to Offer Comm-Stor* II Communications Storage Unit (Transmittal No. 1367). CBEMA's petition urged the Commission to require, during the transition period preceding the establishment of AT&T's separate subsidiary, that AT&T unbundle all charges and costs related to offerings of new CPE filed under federal tariff after the Computer II *Final Decision*. In both the *Final Decision* and the *Reconsideration*, the Commission determined that it would not require the separation of any of the terms or costs of a carrier's offer of CPE prior to the Computer II implementation date. Paragraph 105 of the *Reconsideration* defined the full extent of Computer II requirements concerning the manner in which AT&T was to have conducted CPE-related activities prior to implementation. In any event, CBEMA's petition has been mooted by events. Therefore, we dismiss it.

21. On April 24, 1981, the Computer and Business Equipment Manufacturers Association (CBEMA) petitioned the Commission to amend Part 64 of the Commission's Rules. CBEMA sought promulgation of rules requiring that any petition or request for interpretation, clarification, modification or waiver or any complaint concerning Computer II rules or policies be published in the Federal Register and that interested parties be afforded 30 days for comment from the date of that publication. The Association for Data Processing Service Organizations, Inc., Satellite Business Systems and SPC Communications filed comments supporting CBEMA's petition, and AT&T opposed it.

22. Part One of the Commission's Rules provides procedures applicable to all the forms of Commission action for which CBEMA would impose special procedural rules. Our recent treatment of the numerous Computer II implementation filings demonstrates the Rules' adequacy for according the public appropriate opportunity for comments. At the same time, the current Rules, unlike CBEMA's proposed rules, grant the Commission the flexibility to avoid, through prompt action, disruption to essential communications services. *See, e.g.* letter from Chief, Common Carrier Bureau to Alfred A. Green (December 30, 1982) (E911 Service waiver); letter from Chief, Common Carrier Bureau to Thomas J. Reiman (December 24, 1982) (Data Communications Management Service waiver); letter from Chief, Common Carrier Bureau to Vico E. Henriques (February 18, 1983) (Computer II waiver procedures). Accordingly, we deny CBEMA's petition to amend Part 64 of the Rules.

23. By Petition filed November 9, 1982, North American Telephone Association (NATA) and Michigan Independent Communications Association (MICA) requested the Commission to issue a declaratory ruling that Computer II is violated by the assignment provision stated in an "Agreement for Telecommunications Service" (Agreement) distributed by AT&T for use by the BOCs. That

provision allows a BOC to assign the Agreement to provide terminal equipment to an affiliate. Petitioners assert that the Agreement allows the BOCs to use their dominant position to promote ABI CPE. AT&T argues, in Comments filed December 3, 1982 that the Agreement is necessary to ensure a smooth transition in the provision of complex CPE systems whose installation normally requires long lead times from the date an order is placed. Petitioners reply that AT&T has not explained how or why the assignment provision helps minimize transitional difficulties. In the *CPE Order* at para. 55, we recognized that complex CPE systems may require long lead times between order and installation, and we provided an accounting mechanism which will facilitate reimbursement of the BOCs for certain sales expense associated with equipment which would be installed by ABI in 1983. Accordingly, the Petition filed by NATA and MICA is denied.

VI. *Conclusions and Ordering Clauses*

24. AT&T's plans for the financing and structuring of ABI, modified as we have directed above, provide for the subsidiary's operation in a manner consistent with Computer II. Some of those plans are yet to be fully implemented and others may look quite different in operation. We require that the staff continue its review of AT&T's execution of its plans for the launching of ABI's operations.

25. The Commission's review of AT&T's start-up plans does not end our responsibility in Computer II oversight. We will continue to monitor the manner in which affiliates interact with ABI and how AT&T accounts for transactions between ABI and other affiliates. Further analysis is required of AT&T's use of its information flow controls and, in particular, of its computer security system. Thus, we will require that staffs monitoring efforts assure that not only will ABI be initially structured and financed in accordance with Computer II, but that its ongoing relations with the remainder of AT&T are conducted in a manner consistent with the requirements of Computer II.

26. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), (j) and 416(c) of the Communications Act, That the American Telephone and Telegraph Company SHALL COMPLY with the determinations set forth herein and Appendices A and B attached to this Order.

27. IT IS FURTHER ORDERED That the Chief, Common Carrier Bureau, shall report to the Commission concerning the matters discussed in this order.

28. IT IS FURTHER ORDERED That proceedings concerning the matters raised in the Commission's March 25, 1981 Public Notice, as described in this Report and Order, ARE TERMINATED.

29. IT IS FURTHER ORDERED That the Petition for Policy

Ruling filed April 24, 1981 by the Computer and Business Equipment Manufacturers Association IS DISMISSED.

30. IT IS FURTHER ORDERED That the Petition to amend Part 64 of the Commission's Rules, filed April 24, 1981 by the Computer and Business Equipment Manufacturers Association IS DISMISSED.

31. IT IS FURTHER ORDERED That the Petition for Declaratory Ruling filed November 9, 1982 by the North American Telephone Association and the Michigan Independent Communications Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

REPORT ON COMPLIANCE WITH FCC REQUIREMENTS FOR STRUCTURAL SEPARATION BETWEEN AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND AMERICAN BELL INC.

1. *Introduction*

1. On November 4, 1982 the Commission adopted an order approving AT&T's customer premises equipment (CPE) capitalization plan. *Request for Approval to Supplement the Capitalization of American Bell Inc. to Provide New Customer Premises Equipment*, FCC 82–496, released November 10, 1982 (*CPE Order*). In that order, the Commission found that, based on the information then available, AT&T's plans for the structure and operations of ABI generally appeared consistent with Computer II policies. The Commission, however, withheld judgment on the specifics of such mechanisms as AT&T's information flow controls, employee education programs and employee transfer monitoring programs. Instead, the Commission required the staff to review the details of AT&T's plans for the implementation of its structural separation plans. *CPE Order* at paras. 89–90. This report is provided in response to that requirement.

2. In order to assess the manner in which AT&T is meeting the Computer II requirements, the staff has reviewed AT&T's Capitalization Plan, Report on Services to be Shared, corporate implementation guidelines, employee training, computer security safeguards and other proprietary information protection procedures. The staff then directed to AT&T a series of written questions concerning various aspects of AT&T's implementation plans. The staff has also met with BTL managers responsible for computer security, information flow control and engineering and management support software. Finally, the staff has attended Computer II training programs for Bell system employees.

3. After a comprehensive review of AT&T's efforts to comply with each of the several types of structural separation requirements, the staff narrowed the focus of its review to Computer II provisions concerning information flow controls. Improper transfer of information would be much less susceptible to subsequent detection than would, for example, an improper billing or accounting entry. Effective prophylactic measures are thus important. Accordingly, the staff focused on whether employees will be sufficiently informed about AT&T's obligations under Computer II provisions. Further, the staff sought to assure that opportunities for improper transfer of information were minimized. In sum, the staff has focused on the following concerns.

A. Whether AT&T has developed training programs for its employees adequate to assure compliance with Computer II's limitations on the transfer of certain

information including customer proprietary information, network interface information, and software development information;

B. Whether AT&T has developed protections against misuse of both shared and dedicated computer systems adequate to assure compliance with Computer II prohibitions of information transfer;

C. Whether AT&T's plans to locate ABI employees with Bell Telephone Laboratories (BTL) and Western Electric (Western) employees are consistent with the Computer II rules; and

D. Whether AT&T's marketing plans for ABI result in any joint marketing or the transfer of customer proprietary information.

II. *Training Programs*

Facts

4. AT&T has planned, and is implementing, an employee training program regarding the separation requirements of Computer II. The nature of the training received by an employee will vary depending on whether that employee is: (1) an AT&T supervisory manager, (2) a transferee to ABI, (3) an installation and maintenance (I&M) manager or technician or (4) an AT&T employee who does not fall into any of the above categories.

5. The training program for AT&T supervisory managers relies on a classroom presentation of a videotape followed by a question and answer session, distribution of informational literature and a signed employee acknowledgment. The videotape outlines the Computer II separation requirements and Bell System policy on joint marketing and sharing of customer and network proprietary information. Attorneys either lead the discussion sessions or are available by telephone to answer employee questions. Outlines have been prepared to assist session leaders. The supervisory managers receive two types of informational literature. The first contains frequently asked questions concerning separation requirements and AT&T's answers. The second explains the FCC's Computer II decisions and includes definitions of customer and network proprietary information as well as descriptions of the prohibitions of joint marketing. The latter pamphlet contains an acknowledgement sheet that every supervisory manager, except Western Electric's, is directed to sign to indicate that he or she has read the pamphlet and agrees to comply with the practices which it outlines. The acknowledgement sheet contains a clause stating that the employee who fails to comply with the practices outlined in the booklet will be subject to disciplinary action, including dismissal. AT&T has stated that it expected to have completed this training by January, 1983 for all supervisory managers except for those in the BOCs. The training of BOC managers will be completed in the first quarter of 1983. Bell System supervisory managers will be responsible for informing their subordinates of Computer II requirements.

6. All employees transferring to ABI have received separation requirements guidelines and must sign transfer acknowledgements prior to their transfer. In addition, all business marketing managers who transfer from the General Departments to ABI will have been shown the videotape.

7. A separate set of training programs has been developed for I&M managers and technicans. Managers are shown tapes that describe the changes in the business order process and in material and facility order flows. Technicians will be shown tapes that describe the separation requirements and demonstrate new work order forms. Technicians also will be given a notebook containing detailed procedures and guidelines covering joint marketing and information flow restrictions. In response to a service request AT&T's business CPE installation workforce will be required to record information which will be used for monitoring the BOCs' provision of I&M to ABI. *See* letter from Chief, Common Carrier Bureau to Alfred Green (December 16, 1982); letter

from Bless Striter to William Tricarico, Attachment A (December 28, 1982); letter from Chief, Common Carrier Bureau to Daniel J. Culkin (February 18, 1983).

8. All Bell System employees, management and non-management, will receive, during the first quarter of 1983, a Bell System Code of Conduct which includes a discussion of the Computer II separation requirements. In addition, all nonsupervisory Bell System employees will receive training in a form deemed appropriate by their supervisors who are responsible for informing employees of the Computer II requirements. BTL, which controls access to a uniquely broad range of sensitive information, has required its Public Relations and Employee Information Division to establish a program to inform employees of their responsibilities for controlling information flows between BTL and ABI.

Conclusion

9. AT&T's training program fairly represents the Commission's prohibitions against transfer of customer proprietary information, network interface information and the prohibition against joint marketing of ABI's products and services. The training material available to the staff, however, fails to discuss Computer II's limitations on the joint development of software for ABI products or services. *See generally Final Decision* at 479–80; *Reconsideration* at 81.[1] In contrast, Computer II software limitations are reflected in BTL's General Executive Instructions and Procedures and in an agreement between BTL and ABI for technical information interchange. *See* paras. 27–28, *infra*. These documents are not generally circulated among BTL staff members. Because of BTL's access to a broad range of sensitive information, BTL's Employee Information Division training program should inform software development employees or their supervisors of the Computer II software development policy that is embodied in AT&T documents as summarized in paras. 27–28, *infra*. In addition, training for ABI employees should be consistent with that provided employees of affiliated entities. Finally, AT&T should complete BTL's training program and that of all other Bell entities within 30 days of the release date of this order.

III. *Computer Security*

Access to BTL Computers

10. The Commission permitted transitional sharing of BTL computers on the condition that AT&T institute adequate information controls. *CPE Order* at para. 94. The nucleus of the BTL computer network consists of large mainframe computers located at seven centers throughout the U.S. and interconnected by high speed communication lines. Attached to these mainframe computers are approximately 100 minicomputers. Users have access to these computing facilities and their data files via dial-up or hardwired terminals. Additionally, BTL has thousands of stand-alone mini and microcomputers at its various facilities.

11. ABI is currently in the process of acquiring and installing both mainframe and minicomputers for its sole use in engineering, design and development (ED&D). The process is expected to be completed by the end of 1983. AT&T proposes that until 1984 ABI share four mainframe computers located at two BTL computing facilities. At one other BTL location, AT&T proposes to dedicate two mainframe computers to ABI's exclusive use through December 1983. Peak loads at this latter location might require offloading of work from either of the dedicated mainframes for processing on one of BTL's non-dedicated mainframes.

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[1] Briefly stated, Computer II prohibits joint software development for enhanced services but does not prohibit joint software development for CPE. If there is joint CPE software development, however, that software must be sold to unaffiliated vendors.

12. After the transition period, certain BTL computers may continue to be used to support ABI projects in areas where joint development is permitted by Computer II rules. In such cases, BTL and ABI might exchange data through controlled interfaces between their respective computer networks.

13. BTL's computer security program is designed to screen entry into the computer building, to prevent access to and use of the computers themselves, and to limit persons who are authorized to access the computers to specific data files in the computer. To assure that unauthorized employees do not obtain physical access to BTL computing facilities, only persons with appropriate identification cards are granted entry.

14. To assure the security of computerized data, BTL has established two major levels of security that, respectively, prevent unauthorized access either to BTL's computers or to the data files residing in them. The first level of security uses account numbers, USER/IDs and passwords to prevent unauthorized access to computers. Account numbers are assigned to authorized users by computer center personnel. USER/IDs are permanent codes unique to the user. Users create their own passwords which are known only to them and which must be changed periodically. Users must specify each of these identifiers every time they sign on the computer. All are validated by the computer. Authorized users can use only those computers for which their identifiers are valid. Inability to access certain computers prevents access to the files and data stored in that computer.

15. The second level of security limits the data that a user may reach once the computer has been accessed. The four mainframe computers that will be shared by ABI and BTL employees during the transition may contain BTL files with information prohibited to ABI. BTL standards require that each computer file should be the responsibility of a single employee. This employee, known as the "owner" of the file, may authorize other users to access that file. However, if the employee's data base contains proscribed data, the employee may extend access only to other BTL employees. If that employee's file is created after December 27, 1982, and is maintained in a computer containing proscribed material, the responsible "owner" may not extend access to any other employee. The computer is programmed to prevent access to files by unauthorized persons.

16. All applicable standards required to implement this two-tiered approach have been implemented on the mainframe computers to be shared by ABI during the transition period. The first tier of protection has been implemented on other BTL mainframes. In addition, BTL internal auditors will conduct operational audits of the files which ABI will access. These audits will analyze the preventive, detective and corrective controls contained in the file access software.

17. The security for stand-alone minicomputers and microcomputers consists of physical security. BTL computers will be located in BTL space. To the extent ABI employees will not have access to this space, they will not have access to these computers.

Access to Western Electric Computers

18. ABI is expected to use Western computers for both conveying and obtaining information and specifications pertaining to the design, development and manufacture of products manufactured under contract with Western. Western's computers will also be used to convey equipment ordering information. This use of Western's computers is expected to continue indefinitely. AT&T states that the potential for improper access to proprietary information is less at Western than at BTL because Western does little design or development work. Rather, Western manufactures according to the designs specified by affiliated entities or others. As a result, AT&T states that Western computers contain little, if any, customer proprietary information or network interface information that is not already available to other manufacturers.

AT&T has reviewed Western's computer files to determine both the location and the nature of information which should be protected from ABI access. The staff has analyzed AT&T's report on the results of this review and has sought additional information which it expects AT&T to provide shortly.

Access to BOC and Long Lines Computers

19. ABI will interface with regulated companies' computer systems for four purposes: cutover of installations pending on January 1, 1983; conversion of embedded CPE to unregulated service if authorized by the Commission; interim BOC provision of business I&M services to ABI; and ABI responses to customer service inquiries. For the first purpose, ABI will access the BOC Mechanized Cutover System (MCS) computer system for use in customer installations that are in process on January 1, 1983 and will be ABI CPE systems. Similarly, ABI will access Long Lines' Centralized On-line Data Aggregator (CONDA) computer system to complete electronic tandem network (ETN) activity pending on January 1, 1983. AT&T expects to complete these cutovers by March 31, 1983. ABI will be able to access data only for customers who have provided written authorization for release of those customers' information. *See* para. 40, *infra.*

20. Second, in preparation for the possible "conversion," that is, the detariffing and transfer to ABI of embedded CPE, AT&T plans that, prior to any such conversion, ABI will access all BOC Customer Records Information System (CRIS) data bases for development of test files to assure that conversion systems will function properly. CRIS data, which includes extensive proprietary customer information, will be processed by third party vendors or BOCs to create test files for ABI use. The customer information in these files cannot be used for marketing purposes because: (a) files for service and equipment testing cannot be related to customer identifications, and (b) files for testing customer identification cannot be cross-referenced to equipment files.

21. Third, CRIS will also be used by the BOCs to provide interim I&M to ABI. The security guidelines that AT&T has distributed to the BOCs protect CRIS data by, in general, requiring the BOCs to treat ABI as an independent vendor and, more specifically, prohibiting CRIS processing of ABI input and distribution of CRIS output to ABI.

22. Fourth, following conversion of embedded CPE, ABI service personnel will access BOC billing-related data filed for customer records in response to specific customer service inquiries. AT&T will establish, as part of its embedded base transition plan, controls to assure that ABI access to customers' basic service information cannot be used for marketing purposes.

Access to General Departments Computers

23. ABI and General Departments computers will interface for shared administrative services relying on computer programs and for collection of financial information from ABI. AT&T states that the computers involved may contain customer proprietary or network information, but that ABI will be authorized access only to the specific systems related to Commission-permitted shared services and to the collection of financial data. ABI will not have access to file names, data formats, passwords or other information necessary to access prohibited information.

Conclusion

24. AT&T appears to have devised adequate safeguards for assuring that ABI does not obtain unauthorized information through access to the computers controlled by unseparated affiliates. The effectiveness of these plans, of course, cannot be known until their implementation. Control of ABI access to CRIS, in particular, presents implementation problems of considerable complexity and importance. In order to assure that Computer II information flow prohibitions are properly observed, the staff will monitor AT&T's operation of its security systems.

IV. *Review of Information Transfer Decisions*

25. Computer II permitted ABI to perform joint research and development with other AT&T entities. In these instances, technical information transfer between affiliates and ABI is permissible. However, information cannot be transferred if it is proprietary customer or network information or if it may be used for the development of software for ABI services or products not made available to the general trade. To assure that all information transfers comply with these limitations, each AT&T entity should establish clearly identified channels of authority and points of review to monitor the information flows.

Facts

26. A November 2, 1982 agreement for the interchange of technical information between ABI and BTL states that technical interactions between the two entities are permitted only if network information and customer proprietary information are made available to others at the same time and under the same conditions as they are made available to ABI and if nongeneric software used in ABI's products and services is not obtained from BTL. The agreement states that transfer of technical information under these procedures may not include: (1) unpublished network design and technical standards and information affecting changes to the network which would affect either intercarrier interconnection or the manner in which customer premises equiment is attached to the interstate network; (2) information acquired by affiliate companies by virtue of their common carrier activities; and (3) software used for the provision of an enhanced service, or in customer premises equipment, unless the software is generic software within equipment that is sold "off the shelf" to any interested purchaser. Software is defined by BTL General Executive Instructions as any non-trivial computer program routine, whether in source or object code, and in whatever form or medium recorded, or any written or graphical disclosure from which such a routine can readily be derived. BTL's General Executive Instructions and Procedures prohibit transfer to ABI of unpublished or proprietary network information and customer information and nongeneric software (including firmware) for use in products or services of ABI or any documentation thereof. Such information may be in the form of unrecorded knowledge, ideas, or conceptions or in the more readily perceptible forms of documents, whether written, graphic or electromagnetically stored. Other types of information may be released to ABI by BTL only if in association with a written contract with ABI.

27. Under AT&T's compliance program, each party to the information interchange agreement is required to designate a representative within their companies who shall be responsible for administering these procedures. Transfers of technical information under these procedures shall be made through and received by the representative in each company. The representative shall review and complete the transfer in compliance with the Commission's Rules and shall keep an auditable record of all transfer of technical information under these procedures. BTL's General Executive Instructions and Procedures provide that, except for results of ABI-funded reseach, all requests from ABI for the transfer of information from BTL shall be in writing and be presented to BTL's Internal Technical Information Department (ITID). The ITID shall then obtain the written approval of the originating organizations to distribute the requested information. After it determines that information requested by ABI is in accordance with a written contract with ABI, ITID will transmit the information to ABI. Documents related to ABI-funded research may be forwarded directly to the ABI requestor by the responsible Technical Director, but the ITID shall be notified of the transmittal. The transfer of documents shall be recorded by the ITID in auditable form which shall identify the contract, document(s) transferred, originator, and recipient.

28. Western Electric has in place a security system to protect the company's interest in its proprietary technical information. Instructions issued by the Legal and Patent

Division require that ABI employees are to be treated as "outsiders" and not as Bell system employees. Consistent with this policy, all requests made by ABI for information are to be referred to the General Patent Attorney's organization for review before the requested information is provided. Also, employees who encounter specific information transfer problems must contact a supervisor or legal counsel who will be assisted by Western's Regulatory Matters-Legal organization in providing advice.

29. AT&T states that ABI may obtain information from the BOCs and Long Lines only from the contact points available to other customers and vendors. In addition, a single contact point has been established in each BOC and Long Lines to handle ABI requests for network and customer proprietary information.

Conclusion

30. In general, AT&T's plans describe appropriate steps to be taken to structure a review procedure that assures employees do not make individual and uninformed disclosure decisions. BTL's review procedure in particular uses criteria that appropriately can be used as broad statements of principles with which to identify proper information flows between ABI and any of the other unseparated affiliates. However, many details must be implemented before the plan's effectiveness is demonstrated. Accordingly, the staff should monitor the implementation and operation of these plans. In addition, the staff has identified specific areas where additional protections appear to be necessary. Because disclosures of computerized information are especially difficult to detect, the BTL data base administrator should maintain, as complement to the records kept by ITID, an auditable record of computerized information disclosures to ABI. Also, AT&T should assure that BTL's restrictions on the provision of software to ABI are applied in a manner consistent with the intent of the Computer II rules[2] Finally, we expect AT&T to consolidate in a single ABI office the responsibility to review the propriety of transactions between ABI or unseparated affiliates.

V. *Location of American Bell Technical Personnel*

31. AT&T's July 1, 1982, CPE Capitalization Plan proposed a transition plan for locating ABI's ED&D personnel in BTL buildings. The transition plan involves (1) providing a separate facility for all of ABI's New Jersey ED&D employees by 1985, (2) locating ABI ED&D personnel "to the maximum extent feasible" on January 1, 1983, in separate facilities, the leases for which will be held by ABI and (3) allowing the remainder of ABI's ED&D employees to share space with BTL, but "concentrating" those employees in separate space "to the maximum extent practicable."

32. ABI's separate facility scheduled for 1985 occupancy was tentatively planned for a Freehold, New Jersey site. In November 1982, development of the Freehold facility was postponed and ABI signed a letter of intent with a New Jersey developer for construction of a facility elsewhere in New Jersey for which ABI would sign a long term lease. During the first quarter of 1983, BTL will assist ABI in the lease negotiations and will bill ABI for the assistance on a direct charge basis. By letter dated December 22, 1982, AT&T states that all responsibility for this facility will be placed with ABI once BTL completes its assistance with ABI's lease negotiations, no later than March 31, 1983.

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[2] The adequacy of AT&T's plans for the review of BTL staff decisions to transfer the results of and information associated with ABI-funded research is less clear. These plans may be sufficient if ABI-funded research will be specified by contract and if appropriate auditable records of such transfers are maintained. The staff makes no recommendations to the Commission at this time concerning whether contracts governing ABI-funded research sufficiently specify the subject of such research to support Commission oversight and thereby justify AT&T's plan for such information transfers.

33. Leases previously held by BTL for buildings at three other locations in New Jersey and one outside New Jersey were transferred to ABI on January 1, 1983. These four locations currently provide separate facilities for ABI technical employees.

34. As to the shared facilities, AT&T proposes to locate a substantial portion of ABI's ED&D workforce in BTL's Holmdel laboratory where BTL ED&D employees will also be located. Smaller numbers of ABI ED&D employees will be located with BTL technical staff in each of three BTL sites in Whippany, Morristown and South Plainfield, N.J. In Holmdel, most ABI employees will be consolidated on each of three floors in the six-floor building. In addition, approximately 300 ABI workers will remain in their current locations elsewhere in the building. ABI's Whippany employees will be on the second and third floors, in non-contiguous offices. ABI's South Plainfield employees will be clustered but, nevertheless, will be located on each of the building's three floors with BTL employees. ABI employees at Morristown will occupy contiguous space on the second floor of the building.

35. Despite Computer II's broad prohibitions of shared physical space for ABI and despite parties' objections to the sharing, the Commission permitted ABI's transitional sharing of space with BTL. *CPE Order* at paras. 94–95. That permission was conditioned on termination of the sharing by 1985 and on the institution of strict information flow control mechanisms. AT&T has stated that both ABI and BTL "may be involved in non-generic software development" at each of the sites where those employees would be colocated, but that ABI will develop such software independently.

36. In the view of the staff, AT&T's extensive plans for computer security, disclosure review systems and independently developed software can be greatly undermined by the broad interspersing of ABI and BTL employees. The staff does not believe that AT&T's plans for commingling of ABI and BTL employees represents the maximum separation feasible or practicable. Though consolidation of BTL employees in fewer locations would be preferable, colocation at the facilities identified above is acceptable as a transitional alternative, provided ABI employees are consolidated in clearly defined areas of the facilities. Such consolidation requires that random interspersing of ABI employees be eliminated and that ABI employees be consolidated into discrete working areas to the greatest extent possible. By June 30, 1983, AT&T should report to the Chief of the Common Carrier Bureau on its response to these concerns.

VI. *American Bell's Marketing Plans*

37. Section 64.702(d)(3), as modified by paragraph 98 of the *Reconsideration*, 84 FCC 2d 50, 83 (1980), permits disclosure of customer proprietary information only if a customer authorizes release of the information and if it is disclosed to all authorized members of the public under the same terms and conditions. AT&T's *Transition Guidelines: Account Instructions* indicate that letters may be sent to BOC customers informing them that certain customer proprietary information would be transferred to ABI unless the affected customer objects to the transfer. This would appear to be inconsistent with Section 64.702(d)(3). More specifically, any correspondence to customers which discusses release of customer proprietary information must inform the affected customer of the following: (1) the customer has the power to designate at any time parties that should receive any information pertaining to the customer's communications services or facilities or customer premises equipment, and (2) AT&T will not release any of this information to ABI or any other party without the customer's written authority. In contrast with the *Transition Guidelines*, the model customer letter proposed by AT&T in a November 30, 1982 letter to the Bureau appears consistent with the rules.[3]

[3] This letter states:

> Under the FCC's rules, (Telco) may not release "customer proprietary information"—that is, information describing your current (Telco) provided service and

38. In its November 30 letter, AT&T also proposed to designate individuals in each BOC and in Long Lines to be responsible for documenting transfers of customer information to ABI. In the staff's view, it is necessary for AT&T to maintain a central location in the General Departments which will be responsible for referring inquiries from the public to the appropriate personnel in the BOCs and Long Lines who maintain the records of ABI's access to information on customers. These BOC and Long Lines personnel would provide to any party authorized by the customer the same information provided to ABI.

39. AT&T's Employee Transfer Acknowledgement informed employees who are transferring to ABI that they might bring with them certain data and studies. According to the Transfer Acknowledgment, those studies might include customer proprietary information if such information was gathered prior to separation in anticipation of providing ABI's products and services to customers subsequent to separation. In a November 24 letter, the Bureau informed AT&T that the studies and data described in the Transfer Acknowledgment could be transferred to ABI prior to January 1, 1983 only if they did not identify specific customers. To the extent that AT&T allows transferring employees to retain documents containing customer proprietary information identifying a specific customer, such information may be transferred to ABI only if the affected customer affirmatively authorizes the transfer in writing and then only to those parties approved by the customer. AT&T's November 30 letter states that its Employee Transfer Acknowledgment had been redrafted to inform employees that, while aggregated customer information could be transferred, no such information that is customer specific may be transferred. AT&T's November 30 position appears consistent with the Rules.

40. The Bureau's review of AT&T's *BOC/Long Lines Implementation Guidelines* indicated that AT&T intended to have phones available at BOC Service Centers so that walk-in customers could contact ABI Residence Service Centers. The Bureau's November 24 letter informed AT&T that use of AT&T personnel and facilities to assist the subsidiary's sales and marketing is contrary to the requirements of Computer II. AT&T's November 30 letter states that BOC service centers will not have phones for customers' use in contacting ABI.

41. AT&T's *Transitional Guidelines: Account Instructions* indicated that joint visits to BOC and Long Lines customers by existing BOC and Long Lines representatives and future ABI account executives may be conducted during 1982 for the purpose of "educating and informing" customers concerning the effect of the reorganization on its relations with the Bell System. The joint visits were to be limited to accounts pending on December 31, 1982. The Bureau's November 24 letter informed AT&T that after January 1, 1983, joint visits must not take place except at a customer's (or its agent's) request, and BOCs must make themselves equally available to customers using CPE provided by non-AT&T equipment suppliers to assist in planning communications systems. AT&T's November 30 letter responds that AT&T intended that joint visits take place only at the customer's request after January 1, 1983 and "on a consistent basis for all suppliers." It stated AT&T's intent to reaffirm to account executives the cutoff date for AT&T-initiated joint visits.

VII. *Conclusion*

42. AT&T has taken initial steps toward implementation of Computer II separation

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equipment unless you authorize such release in writing. Such information must be made available on the same terms and conditions to any person you authorize in writing to receive it. It may be important for American Bell to have such information, in order to completely understand the current status of negotiations and to avoid disruption or delays in honoring commitments or proposals. If you wish to provide such information to American Bell, please sign the attached copy of this letter and return it promptly.

conditions. Full implementation, however, will not be attained unless AT&T adopts the modifications recommended above. In particular, AT&T should include in its training material for software development staff, a discussion of the Commission's limitations on joint software development. AT&T should complete training of all employees within 90 days of the implementation date. AT&T must also require that the BTL data base administrator maintain records of computerized information disclosures. AT&T must revise its plans for colocation of ABI and BTL facilities to provide for consolidation and identifiable separation of ABI software development staff. AT&T has stated that it is reviewing computer security at Western and that it will report to the staff on the results of that review. The staff will continue to monitor AT&T's ongoing implementation process.

APPENDIX B

REPORT ON CPE PREOPERATIONAL AND SUBSIDIARY FORMATION EXPRESS

I. *Introduction*

1. In the Computer II decisions[1] the Commission permitted the American Telephone and Telegraph Company (AT&T) to offer enhanced services through a new subsidiary separated from its regulated activities. The Computer II decisions also required that AT&T offer customer premises equipment (CPE) only through a separate subsidiary and on a non-tariffed basis. In order to protect ratepayers from bearing the costs of developing enhanced services or CPE which would ultimately be offered by the subsidiary, the Commission required AT&T to file periodic reports as to the "costs of setting up the separate subsidiaries and . . . the costs of developing the CPE and the enhanced services that will be offered by the unregulated subsidiaries after separation."[2]

2. On June 16, 1982, the Commission approved AT&T's plan for capitalizing its new subsidiary formed to offer unregulated enhanced services, American Bell, Inc. (ABI). *Enhanced Services Order*, 90 FCC 2d 404 (1982). That order included a report of the Common Carrier Bureau staff's review of enhanced services development expenses, subsidiary formation expenses, valuation of assets to be transferred to the subsidiary and AT&T's control mechanisms to assure compliance with Computer II separation requirements. The order directed the bureau staff to continue its review of these items and of development expenses for CPE.

3. On July 1, 1982 AT&T filed its plan for additional capitalization for ABI to allow it to offer new CPE. This plan contained, among other things, estimates of the value of fixed assets to be transferred to ABI, actual CPE engineering and development costs and subsidiary formation expenses through December 31, 1981 (as reported by AT&T) and AT&T's estimate of CPE and subsidiary formation expenses for 1982.

4. This report summarizes the Common Carrier Bureau staff's audit to date of AT&T's preoperational expenses on behalf of ABI for CPE and subsidiary formation. The report is divided into four sections. The first (at para. 5) is an overview of the

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[1] Amendment to Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C.Cir. 1982).

[2] Reconsideration, para. 105. AT&T filed reports pursuant to para. 105 on January 29, 1981, August 14, 1981 March 5, 1982 and August 13, 1982. These reports are referred to herein as "the para. 105 reports." In the CPE Capitalization Plan Order, FCC 82–496 (released November 10, 1982) (CPE Order) the Commission again described the CPE and subsidiary formation expenses which were subject to the paragraph 105 reporting requirement and for which reimbursement to the regulated companies might be required. CPE Order, paras. 48–55.

staff's audit objectives and procedures. The second (at para. 11) is a brief summary of the AT&T General Departments' and Bell Telephone Laboratories' (BTL) accounting systems. The third (at para. 19) recapitulates the staff's review of the reported expenses for each Bell entity.[3] The fourth (at para. 68) lists staff recommendations and conclusions and summarizes the work to be completed.

II. *Overview of Audit Objectives and Procedures*

5. Separating expenditures for CPE which should properly be borne by ABI form those which should not is somewhat more difficult than for enhanced services. Unlike enhanced services, CPE has long been offered by AT&T's regulated companies. CPE already subject to tariff (the "embedded" CPE) will continue to be offered by the Bell Operating Companies for some time after January 1, 1983. Thus, due to AT&T's offering of both regulated and unregulated CPE, separating those CPE expenses which should properly be borne by ABI from those which are of benefit solely to the regulated companies is more complex.

6. In order to conduct an adequate review of preoperational expenses for CPE as well as enhanced services and subsidiary formation, the staff was required to look behind the books of account to AT&T's underlying assumptions as to what expenses were reportable. The staff was also required to review closely AT&T's systems and methodology for accumulating and reporting those expenses.

7. The audit of AT&T's preoperational expenses for subsidiary formation and CPE was intended to determine whether:

1) AT&T identified and reported all CPE preoperational and subsidiary formation expenses;

2) all direct expenses for CPE development or subsidiary formation were included in full in the reports and not included in overheads (loadings); and

3) all expenses for the benefit of ABI which were charged to ratepayers via license contract billings or as direct charges to the Bell Operating Companies (BOCs) or Long Lines were reported.

8. The audit steps necessary to resolve these issues include:

1) an independent staff identification of probable CPE development effort at Bell Telephone Laboratories (from cases and projects) and at AT&T's General Departments (from Budget Decision Packages (BDPs));

2) a review of all elements included in overhead pools to determine whether they are reasonable, whether they include specific tasks or expenses that should be charged directly to CPE preoperational or formation projects, and whether derivation of the overhead rate used for allocation is consistent with prior practices or in conformance with other Commission directives; and

3) an audit of intercompany accounts to ensure that: (a) CPE preoperational and formation expenses were excluded from license contract billings; (b) direct billings (non-license contract) to the BOCs, Long Lines, BTL, and other affiliated companies do not relate to CPE or formation activities; (c) bills for BOC support activities were identified and reported; and (d) the amounts to be reimbursed to the BOCs and Long Lines are correct and have been accurately reported.

[3] AT&T included expenses incurred by WECO in its para. 105 reports. AT&T states that all WECO expenses are recovered in the price of its products. Therefore, AT&T states, no reimbursement to ratepayers is required. The Commission has requested AT&T to provide additional support for these arguments regarding WECO expenses and has requested public comment on the matter. CPE Capitalization Order, FCC 82–496, paras. 75–84 (November 10, 1982).

9. The staff's review began with the Bell System internal auditors' audits of actual cost data submitted by AT&T. The internal auditors' findings, recommendations and workpapers were made available to the staff for review. The staff's analysis of this information and interviews with each of the Bell auditors helped define the issues.

10. The scope of the audit included field reviews at the sites where the major efforts relating to CPE development and subsidiary formation occurred, interviews with managers at BTL and the General Departments, tests of the internal controls and review of the internal changes to separate regulated and nonregulated effort within the company.

III. *AT&T's Accounting Systems*

A. *The AT&T General Departments*

11. Long Lines Department was responsible for implementing the first phase of AT&T's compliance with Computer II, the establishment of a separate subsidiary to offer enhanced services. In October 1980, AT&T formed a separate group in the General Departments,[4] Department 31, to organize a separate subsidiary to offer CPE. During 1981, other parts of the AT&T General Departments were enlisted to provide support to Department 31. Approximately 40% of the direct labor incurred by the General Departments for subsidiary formation was provided by these other groups.

12. The AT&T General Departments' cost accounting system is based on "Budget Decision Packages" (BDPs). AT&T defines BDPs as follows:

> A budget decision package is a grouping of section activities, and their associated costs, necessary to achieve a single result or organizational purpose. Decision packages are the building blocks of the General Departments budget; organization budgets are obtained by adding together the budgets of all decision packages in the organization . . . .
>
> The grouping of General Department's work into budget decision packages begins at the section level. A section may have any number of packages, depending upon how the section wishes to define its work. Definition of budget packages is a critical task in the budget process; it determines how spending proposals are presented to higher levels of management, how responsibilities for cost performance are allocated within the section and how costs will be tracked. For these reasons, the responsibility for defining budget decision packages rests with the section head. While preparation of budget packages can be assigned to subordinates, only the section head can make the decision on how to structure the work of the section into budget packages.

AT&T General Departments Budget Manual, sections 2.2.2 and 2.2.3.

13. The expenses incurred in forming ABI are captured for each department in separate BDPs and accumulated through the use of an interdepartmental code. This interdepartmental code reduces the need to compile expenses manually as was done during the earlier formation stages. It also reduces the possibility of omissions. Procedures and controls are presently in place to ensure that BDPs attributable to ABI contain the correct interdepartmental code. These procedures also permit costs incurred and billed by BOCs to be included in the proper BDPs and accumulated in the summary reports.

14. The expenses relating to preoperational CPE development efforts in the General Departments were not always clearly identified in the BDPs. The marketing departments, for example, initially used a system of product codes to identify all

[4] The AT&T General Departments provide overall corporate management services to all parts of the AT&T organization.

preoperational CPE activities. This system was changed after an internal audit finding in early 1982 disclosed that the accumulation of expenses to product codes was not reliable. As a result of this finding, the marketing departments (and all other affected departments) were required to analyze their operations to identify all CPE effort relating to the introduction of new products or to development of enhancements or new features for existing products. The marketing departments were required to estimate the portion of each BDP attributable to preoperational CPE expenses. As a result of this review, AT&T reported an additional $44 million in preoperational expenses incurred through December 31, 1981 in its August 13, 1982 para. 105 report. From 1980 through mid-1982, guidelines and definitions for General Departments BDPs were revised several times, resulting in the present system to separate regulated from unregulated activity and to separate unregulated activity into discrete identifiable BDPs.

B. *Bell Telephone Laboratories*

15. BTL does not itself manufacture or sell products. All of its work effort is funded by specific customers, usually other Bell System companies. The major categories of BTL work and the companies that authorize and fund them are as follows:

Research and Systems Engineering (R&SE)—

AT&T (including Long Lines Department);

Specific Design and Development (SD&D)—

Western Electric Company (WECo);

Government (Military)—subcontracts through WECo;

Business Information Systems Programs—Bell

Operating Telephone Companies (BOCs); and

Miscellaneous customers—Sandia, Teletype, etc.

Bell Laboratories Accounting System, 1 (1980).

16. BTL's work program budget is divided into the following sectors: Bell Regulated Entity (BRE),[5] Separated Subsidiary (FSS - now ABI), Directory, Advanced Mobile Phone Service, AT&T International, Military, and Common. Within these sectors BTL divides its work into cases and sub-cases for purposes of tracking costs and billing customers. All costs are charged to cases or sub-cases.

17. BTL work is divided into projects for purposes of managing the work effort. BTL's "Corporate Project Structure" is divided into eight broad segments: Network, Business, Residence, Directory and Public Services, Bell Projects—General, Basic Technology, Research, and Government and Other. The project structure was developed beginning in 1981 and was designed, in part, in response to regulatory changes. Prior to April 7, 1980, the date of adoption of the *Final Decision in Computer II*, development costs were also accumulated on an organizational basis. By early 1981, however, costs were identified by project, using the newly established corporate project structure. Each project falls within one of the segments. Each project is an aggregation of sub-cases. Each sub-case is assigned to one, and only one, project.

18. In preparing the para. 105 reports, BTL engineers first selected all projects which they deemed reportable. Costs accumulated in the sub-cases associated with those projects were included in the para. 105 reports. For those projects selected as

[5] At present, the BRE sector includes work for both Long Lines and the BOCs. BTL recognizes that, with the divestiture, one such entity will not be enough. This sector will, therefore, be further divided.

reportable, BTL reported all costs incurred after April 7, 1980. Developmental costs for the period prior to April 7, 1980 were reported for five specific products. These costs were limited to SD&D and are small in comparison to the total. Many BTL projects relate to both regulated and non-regulated equipment. For those developmental projects common to both, BTL estimated a percentage to be attributed to CPE development.

IV. *Staff Audit*

A. *Overview of Staff Procedures*

19. The staff reviewed the procedures for identifying and reporting CPE preoperational and subsidiary formation expenses at BTL, the General Departments, Western Electric Company (WECO), and the BOCs in Washington, D.C., and New York. On July 26, 27 and 28, 1982, Commission staff members visited BTL and the General Departments to assess the basic record keeping methods, supporting documents, and the types of internal reports generated. The purpose of this visit was to evaluate the scope of the audit review and develop detailed audit steps.

20. Beginning in August 1982, the staff reviewed all BDPs issued by the General Departments for the period 1980–82 to determine whether all those related to CPE development or subsidiary formation were reported. At the same time, the audit staff and FCC staff engineers reviewed all BTL cases and projects possibly related to reportable CPE development. The items selected by the staff were matched against the items reported by the General Departments and BTL. This selection and matching process permitted the staff to conduct an independent review of the General Departments and BTL systems for identifying and reporting CPE preoperational expenses. The unreported items were individually reviewed with General Departments and BTL personnel. The results of this review are described below.

B. *Review of Subsidiary Formation Expenses*

21. AT&T reported $446.3 million in total expenses for CPE development and subsidiary formation through December 31, 1981. Formation expenses were $27.4 million or approximately 6% of this total. Of this $27.4 million, $20.4 million were incurred by the General Departments and $7 million were incurred by the BOCs. These figures were increased by a total of $44 million in AT&T's August 13, 1982 supplemental filing to a total of $490 million, $28.3 million of which were for formation expenses. Approximately 25% of the $28.3 million in formation expenses were incurred by the BOCs.

22. The specific General Departments involved with the formation of ABI through December 1981 were:

Department	
08	Human Resources Development
11	Legal
14	Comptroller
15	Treasury
25	Business Services
26	Business Marketing
27	Residence Marketing
28	Support Services
31	Unregulated Entity Planning
58	Information Systems—Staff

23. Department 31 was established in October 1980 to plan for the unregulated subsidiary for CPE and enhanced services. Department 31 has been responsible for overall coordination and planning. This department incurred over 60% of the direct General Departments formation expenses. The marketing and information systems departments accounted for most of the remaining 40%. Other departments, including the comptrollers, legal and treasury departments, charged some expenses to this effort by use of separate BDPs and a special interdepartmental code. While the initial charges by these departments were insignificant compared to total reported expenses, they are now increasing as ABI gets closer to January 1, 1983.

24. The staff interviewed seventeen directors and managers in charge of approximately ten different functions in Department 31. These areas included data systems, security, human resources, accounting, treasury, purchasing, taxes and legal. All of these functions had separate BDPs which were identified as subsidiary formation expenses. Other departments interacted with Department 31 as certain information or advice became necessary. Certain of these departments had separate BDPs for subsidiary formation expenses. Their costs were accumulated and reported through use of the interdepartmental code. Other support activities were charged to subsidiary formation BDPs using the exception time reporting (ETR) procedure.[6]

25. The staff also reviewed ABI's acquisition of software. The staff obtained copies of contracts issued for software packages. These contracts were placed by AT&T with outside firms except for a WECO billing program being purchased from Long Lines and a payroll system purchased from C&P. AT&T informed the staff that charges for these programs were being made to appropriate reportable BDPs. In addition, AT&T stated that all contracts would be re-executed by ABI in December 1982. Other software packages for marketing data and non-administrative applications transferred to ABI prior to January 1, 1983 will be reviewed during our continued auditing oversight.

26. Several other parts of the General Departments appeared to have had some responsibility for subsidiary formation. This was particularly evident in the tax, security, and insurance functions. The staff will review these areas in greater depth to determine that all subsidiary formation expenses have actually been reported.

27. Generally, the staff found that AT&T attempted to separate ABI formation activity from its regulated business. The separation of the planning group, Department 31, appears to have been a reasonable approach. In the early stages, however, other groups outside of Department 31 did not immediately establish separate BDPs to report subsidiary formation expenses, but used the ETR procedures to charge time to ABI formation activity. This procedure was not completely documented to support fully the extent of charges. The staff was able to verify only that some charges were assigned to reportable BDPs via the ETR system. The ETR procedure was tested by the AT&T internal auditor who recommended that where a consistent portion of an employee's time can be expected to be charged to subsidiary formation or CPE development the guidelines should be amended to permit automated allocation.

C. *Review of CPE Development Expenses*

28. The system used by AT&T's management to decide whether a product should be developed for eventual sale or lease to potential users typically consists of eight phases: determination of market need, concept formation, system design, prototype test, final development, introduction, implementation, and life cycle management. The organizational vehicle used to accomplish these tasks is the Product Team. Each team includes participants from BTL, WECO and the General Departments, including

[6] *See* Shared Administrative Expenses Order, 90 FCC 2d 184, para. 55 (1982).

the comptrollers, legal, business services, marketing, and rates and tariffs departments. Thus each team includes all of the required expertise. Each team member participates to the extent necessary at the appropriate time. For example, advertising might be heavily involved during the product introductory phase but not involved at all during earlier phases.

29. Each team is directed by a product manager who is responsible for coordinating the effort and reporting to management. The team issues periodic progress reports to management including recommendations as to whether to proceed, modify, or abandon the project.

30. During 1981, project numbers were established by each team to capture individual product costs. In February 1982, however, the General Departments' internal auditor discovered that the project numbers were not controllable or reconcilable within the existing data collection system and could lead to possible under-reporting of expenses. As a result, AT&T abandoned the project number system and adopted its Budget Reporting and Tracking System (BRATS) to accumulate BDPs for General Departments' CPE development expenses.[7] AT&T established an interdepartmental code to summarize BDPs and changed the criteria for establishing BDPs (see para. 14 above).

31. For 1981 and prior periods, each department reviewed its BDPs and listed the ones it considered reportable. For BDPs containing both reportable and non-reportable work, each department estimated the percentage it considered reportable.

32. CPE development expenses were incurred by the General Departments, BTL, WECO, Long Lines, the BOCs, and the Bell System Center for Technical Education (BSCTE). The July 1, 1982 Capitalization Plan reported a total of $418.9 million for preoperational CPE development. The following chart sets out the amounts contributed by each of these entities for CPE development as of December 31, 1981:

Entity	*$ (in millions)*	*Percent of Total*
General Departments	35.8	8.6
Long Lines	.1	-----
BOC	.3	-----
BTL-R&SE	114.7	27.4
BTL-SD&D	242.5	57.9
WECO[8]	25.3	6.1
BSCTE	.2	-----
	418.9	100.0

33. During the week of August 30, 1982, members of the audit staff conducted interviews at Bell facilities in New Jersey to examine further the methods used by AT&T to collect and report preoperational CPE and subsidiary formation expenses. The field tests were designed to identify products or enhancements to be introduced after January 1, 1982.[9]

34. The staff reviewed over 11,000 BDPs in use during the 1980–1982 period and selected over 500 which appeared to contain CPE preoperational or formation activity

[7] Paras. 12–14, *supra*. See Enhanced Services Order Appendix D, paras. 28–39, for a more complete description of the General Departments' accounting and control systems (including BRATS).

[8] *See* note 3, *supra*.

[9] AT&T determined that since the major benefit from products introduced after January 1, 1982 would accrue to ABI, all developmental expenses for those products should be reported under para. 105.

and which appeared not to have been reported by AT&T. These 500 items were submitted to AT&T for review and further explanation as to why they were not included in the paragraph 105 reports. AT&T furnished explanations for many of the items. AT&T informed the staff that many of the other BDPs had already been reported in the August 13, 1982 filing. In addition, BDPs totalling an additional $2 million would be reported in the next paragraph 105 filing.

1. *The AT&T General Departments—Marketing*

35. The General Departments marketing organization reports to an executive vice president and is composed of three departments, each of which is directed by a vice president. A brief description of each of the three marketing departments is shown below:

1) Business Services—Provides support for AT&T's equipment, products, and services both in the regulated and unregulated sectors. Examples of activities supported include operations, standards, billing procedures, installation and repair, and information systems.

2) Business Marketing—Provides market research, product management, revenue strategy, and identification of customer needs.

3) Residence Marketing—Similar to the business segments but concentration is on residence customers rather than business.

36. These departments are similar, and presently function both in the regulated and unregulated environments. In 1980 and 1981, AT&T had to estimate the expenses for unregulated activities for each BDP to conform to Commission requirements. After the completion of AT&T's internal audit and the distribution of new guidelines in 1982, new BDPs were established to account for the unregulated activity. Establishment of BDPs is, however, highly discretionary with the individual managers. Reviewing these managerial judgments was a major problem for the Commission staff. The Business Services and Marketing Groups each used different methods of estimating the unregulated activities in the BDPs. Our review of their effort is still in progress. We are unable to complete this part of our audit until the final account balances for 1982 are determined.

a. *Business Services*

37. The staff interviewed five managers within this department to determine their specific functions and the basis they used for selecting reportable BDPs. The major divisions of the Business Services Department were small terminals, data systems, product performance, and large PBXs. These areas charged time to both CPE development and regulated activities. Approximately 50% of the expenses of this department are charged to clearing accounts that are distributed to other accounts. Clearing accounts are not billed through a license contract allocator but are included as overhead for billing purposes using the formula determined for each department billed. Amounts that are distributed from clearing accounts lose their identity and become either a loading element or part of the expenses of a specific department. Departments are then billed through the license contract using the formula determined for each as indicated in the annual License Contract Services and Costs Report (Grey Book). Non-license contract expenses incurred by this department are charged to a deferred asset account, and subsequently billed directly to the BOCs and Long Lines.

38. Each BDP for this department was reviewed by the staff. Those that appeared to be reportable were compared to those actually identified as reportable by AT&T. Not all of these staff selected items were included in the para. 105 reports or the July 1, 1982 Capitalization Plan. The company is presently reviewing the BDPs identified by the staff. AT&T has acquiesced in staff findings indicating that at least $3.6 million of additional CPE preoperational expenses should be reported.

39. AT&T guidelines for reporting CPE preoperational expenses state that "expenses incurred by one Bell System Company which are subsequently billed to another Bell System Company . . . , are to be reported only by the Company which initially incurred the cost." In its review of BDPs for the Business Services Department, the staff discovered that expenses incurred by the BOCs on behalf of Business Services for CPE development amounting to $1.2 million were not included in the para. 105 reports. This amount will be included in the next para. 105 report.

b. *Business Marketing*

40. The staff analyzed the product lists supplied by AT&T and selected nine product managers for interview. These interviews were conducted to determine the procedures which the managers used to select reportable CPE development expenses and to test the basis for estimating the 1980, -81 and -82 reported expenses. In addition, the staff reconciled the General Departments' product lists to BTL cases to ensure that BTL reported all CPE development effort. The staff's review showed that the basis for estimates used to assign a portion of a BDP to a reportable category was not fully supported by documentation. The staff is continuing its inquiry in this area.

41. The staff found that many products were being developed for ABI by unaffiliated companies. Some of these outside products are scheduled for modification by BTL and then for resale by ABI. The BTL modification costs are being charged to specific cases. They are presently billed to AT&T. To the extent that these costs have been included in license contract billings, the regulated companies must be reimbursed. In the future, ABI will be charged directly for modification costs as a specific customer.

c. *Residence Marketing*

42. Residence marketing is organized differently from the business departments, but its major functions are similar. The staff tested the basis for estimates that were used to separate BRE and ABI activity and found that the basis used was reasonable and was supported by underlying data and rationale. AT&T used product team reports to substantiate the estimates and rates of expenditure during the development cycle of specific products.

43. In reviewing Residence Marketing BDPs, the staff discovered that BOC expenses amounting to $2.9 million incurred on behalf of Residence Marketing were not included in the para. 105 reports by either the BOCs or Residence Marketing. These expenses will be reported in future para. 105 reports. See para. 39, *supra*.

44. The structure of this department includes an administrative division which is responsible for overall department direction, planning and coordination. None of the administrative expenses, however, were charged to ABI. The staff believes that the administrative expenses of this department as well as the other two marketing departments should be charged proportionately to ABI, instead of being charged wholly to the regulated companies. The staff has developed a method of allocating these administrative expenses ratably to both regulated and ABI efforts. See paras. 70–72, below.

2. *BTL*

45. Examination of BTL's identification and reporting of CPE preoperational expenses began with a review of the BTL internal audit reports and supporting workpapers. The extent of the auditor's tests appeared satisfactory. The staff, therefore, concluded that it would not be necessary to duplicate the internal auditor's program.

46. Instead, the staff determined that an independent process was necessary to identify CPE related effort. A group of FCC auditors and engineers and a computer systems analyst reviewed all of BTL's individual task descriptions (over 2000 cases and project profiles, See paras. 16–18, *supra*), and selected approximately 400 items

which appeared to be CPE related. The staff effort included tests to identify specific products that were included on the product lists furnished by the marketing departments. Approximately 300 of the 400 items selected by the staff had been reported by BTL as CPE preoperational expenses. The remaining 100 required further scrutiny in the field with BTL personnel.

47. That review took place during the week of September 13, 1982. The staff discussed BTL's identification and selection process for CPE preoperational expenses with BTL personnel. The staff found that the effort prior to April 7, 1980 that was considered reportable ($15 million) was for five specific products that would be introduced by ABI. The rest of BTL's CPE expenses prior to April 7, 1980 were for products that were in the embedded base and were not, therefore, reportable. Subsequent to April 7, 1980, all CPE development costs were identified and reported according to AT&T guidelines.

48. The 1980 CPE effort reported by BTL was derived from estimates based on the time each specific department spent on CPE related work. The staff's examination of this estimating process and the supporting documents led it to conclude that BTL had used a reasonable and appropriate method to identify and report its 1980 CPE preoperational expenses.

49. The staff reviewed BTL's project profile forms and selected 76 projects as possibly CPE related for the January 1, 1981 through June 30, 1982 period. These projects represented several of BTL's segments (Network, Business, Residence, Bell Projects, Research and Basic Technology).

50. Of the 76 projects identified by the staff as CPE related, 32 had already been reported by BTL in the March 5, 1982 paragraph 105 report and were, therefore, excluded from further review. Expenses reported for these 32 projects totalled $76.6 million.

51. The 44 remaining projects totalled $193.6 million. The staff discussed these projects with BTL officials to determine why they were not reported as CPE. Of the 44 projects, the staff discovered that 24 were funded by WECO as SD&D or by the operating telephone companies directly. The remaining 20 were funded by AT&T as R&SE. The results of staff reviews with various BTL managers for each of the segments concerning the 44 projects is discussed in paragraphs 53–63, below.

52. The staff also interviewed three BTL engineers responsible for 22 projects that were reported as CPE preoperational expense to test the procedures followed to identify these projects and report the expense.

a. *Network*

53. BTL did not include any of the 17 network projects selected by staff as CPE for purposes of paragraph 105 reporting. Twelve of the seventeen were funded by WECO as SD&D. Five were funded by AT&T as R&SE. Generally, staff discussions at BTL disclosed that the network projects identified involved services that were for the benefit of an entire network or system or were for the development of network-related products and, consequently, were not reportable under para. 105.

54. The staff identified two other BTL network projects that appeared to involve CPE development. These were mobile radio systems and CPE to be marketed internationally. According to BTL officials, neither of these projects involves products to be sold by ABI and, therefore, neither was reported. Mobile radio is being funded by a separate AT&T corporation. International CPE is being funded by AT&T Interna-

tional. The staff was informed that CPE to be sold internationally must meet different engineering and design standards than products to be sold domestically.[10]

b. *Business*

55. The staff identified fourteen business projects as CPE related. Thirteen had already been reported by BTL as CPE. The remaining project involved equipment used in the central evaluation of network services for business customers. It appears to be totally network related. It was, therefore, properly excluded from paragraph 105 reporting.

56. BTL reported $361 Million ($70 million for RS&E and $291 million for SD&D) of business related CPE development costs through June 30, 1982. This represents about 72 percent of the $501 million of CPE development expenses reported for this period.

57. The staff discussed the selection of the projects reported as business CPE with BTL managers, and reviewed the workpapers prepared by BTL engineers to support their selections. The staff also discussed the CPE identification process with three of the BTL engineers responsible for business projects.

58. The staff found that the BTL Business segment identified and reported all CPE related projects and costs for 1981 and the first six months of 1982. Exclusions from this segment were previously reported as preoperational expenses for the Advanced Communications Services (ACS).[11] Reported costs were traced to BTL reports showing project costs by segment. Therefore, the staff believes that BTL included all relevant business project costs in the paragraph 105 reports.

c. *Residence*

59. The staff identified sixteen residence projects as possibly CPE-related. Thirteen had already been reported by BTL as CPE. The three excluded projects appeared to be either ACS preoperational expenses or work for the operating telephone companies regarding embedded CPE. Therefore, BTL excluded them from the paragraph 105 reports. Whether this exclusion of work for the BOCs regarding embedded CPE was proper will require further study by the staff. See *CPE Capitalization Order*, paras. 50–54.

d. *Bell Projects (BP)—General*

60. The staff identified fifteen BP-General projects as possibly CPE related. Only five were reported by BTL as CPE. Of the remaining 10, six were projects involving regulated products or services for the BOCs. One involved CPE work for AT&T International and was designed to meet international standards. Two projects were for business improvement studies involving development of software and standards for information systems. Neither of these projects appears to be directly related to CPE development work. The remaining one involved patent work for AT&T and WECO to secure CPE patents which became BTL property. In the opinion of BTL staff, any sales of patents to ABI must be for proper consideration, which would include the value of this patent work.

e. *Research*

61. The staff identified eight research projects totalling $62 million as possible CPE

[10] The Further Reconsideration of Computer II, 88 FCC 2d 512, 554 (1981), permits AT&T to continue marketing CPE internationally as it has in the past.

[11] ACS preoperational expenses were reported in connection with AT&T's Capitalization Plan for enhanced services, filed November 30, 1981. AT&T now calls this service the "Advanced Information Service, Net 1000." This enhanced service is offered by ABI. *See* Enhanced Services Order.

development work. One of these was reported as CPE by BTL. The staff discussed the remaining projects with BTL personnel and found that they were for experimental research that may evolve into products that can be used by the BOCs or possibly be sold by ABI. The point in time that this may occur, or even whether it will occur, is unknown at this time. In any event, much of this basic or fundamental research does result in some contribution to Bell's technology and it seems reasonable to allocate some portion of these expenses to ABI.

f. *Basic Technology*

62. Staff identified six projects totalling about $37 million that appeared to be CPE related. None of these projects were included in the paragraph 105 reports. All were funded by WECO as SD&D. The staff did not continue to examine this area at this time. See note 3, *supra.*

63. Several other pertinent areas were not reviewed because of time constrants. These include development of quality assurance and reliability standards for CPE under development. In addition, they include development of training courses, mannuals and other educational materials relating to that CPE. Additional analysis will be required to ensure that ABI bears its share of this type of effort.

g. *Analysis of Overhead*

64. The staff has begun its review of the composition of the overhead pools and the allocative formulas used at BTL. The staff will continue to examine the applied loadings and to assess the extent to which direct CPE expenses were being included as loadings.

65. The separate case required in the *Enhanced Services Order* for all moving expenses involving ABI has not yet been established. BTL is attempting to identify these expenses and their source.

66. Additional field work at BTL will include the review of certain adjustments to reported loading costs recommended to BTL by the staff. Apparently, the para. 105 reported data were selected from a BTL report computed by using standard loading rates. The billing to AT&T, however, included the actual load costs. These actual costs were not allocated to each individual case at year end. There was, therefore, a variance between the application of standard rates and the actual expense incurred. This difference had an effect on the reported CPE preoperational cost. BTL estimates the difference at $5.2 million for the period 1979–81. This adjustment will be included in the next para. 105 report.

67. Coincident with the audit of overhead elements, the staff discovered that BTL was providing certain administrative services to ABI. This situation occurred because of the temporary co-location of BTL and ABI personnel at the Lincroft facility. The cost of these services is estimated at $3.2 million for the period July 1, 1982 through December 31, 1982. BTL stated that ABI will be charged for the cost of these services as soon as the authorization for billing is established. Since these services are of an overhead nature, they are allocated to customer cases as a loading and billed. BTL, therefore, will have to adjust past billings to correct this misallocation. The actual billing to ABI and the effects of the adjustments will be monitored by the staff during its continuing audit program. The staff must also review the extent to which formation expenses were incurred by BTL on behalf of ABI and have been reported.

V. *Conclusions, Findings and Recommendations*

A. *Summary of Findings*

68. The staff's findings of additional expenses to be included in subsequent para. 105 reports and which may be eventually reimbursed to the BOCs and Long Lines are summarized below:

	(000)'s
General Departments	
Business Services BDPs omitted (para. 38, *supra*)	3,583
BOC work for Business services (para. 39, *supra*)	1,180
BOC work for Residence Marketing (para. 43, *supra*)	2,929
Additional BDPs to be reported by other General Departments (para. 34, *supra*)	1,980
TOTAL GENERAL DEPARTMENTS	$9,672
BTL	
Adjustment of BTL loading rates (para. 66, *supra*)	5,200
Administrative services to be billed to ABI (para. 67, *supra*)	3,200
TOTAL BTL	$8,400
COMBINED TOTAL	$18,072

These amounts have been discussed with AT&T. AT&T has agreed with staff findings and will include these increases in the next para. 105 report. Some of the unreported dollars shown above include 1982 estimates, but will be adjusted to actual costs when final figures are available. The staff is continuing to examine non-license contract invoices, overhead elements, and BOC billings.

69. As a result of the staff reviews of AT&T's reported CPE preoperational and subsidiary formation expenses, its applied overhead loadings, and its compliance with the Commission's separation requirements, the staff has concluded that AT&T has made a reasonable effort to identify and report all unregulated activity. Except for some omissions during compilation of the reported data and additional expenses to be reported as a result of staff findings, the actual costs reported in the July 1, 1982 Capitalization Plan have been reconciled to existing AT&T reports produced from their financial accounting systems. The July amounts have already been adjusted upward (see AT&T's August 13, 1982 para. 105 filing). These figures will again be increased as a result of staff findings. These adjustments will be reported in future para. 105 filings.

B. *Allocation of Administrative Expenses*

70. Other allocative mechanisms used by AT&T to distribute loadings to the unregulated activity appear to be inadequate. The staff found that the AT&T Marketing Departments have not assigned any part of their administrative costs to ABI. These costs were incurred to manage, plan and support the department's operations and benefited both AT&T's regulated operations and ABI. AT&T takes the position that the supervisory loadings applied to the CPE reported expenses compensate for not charging ABI for these administrative costs. Therefore, such assignment is unnecessary. The staff disagrees with this opinion.

71. The total expenses incurred by all three departments in the marketing organization, including administration, were $208 million for 1981. These three

departments spend money for both regulated and ABI effort. It can be presumed that administrative expenses are incurred in managing the entire organization. One department, Residence Marketing, incurred approximately 20% in 1980 and 30% in 1981 in its administrative division.[12] The remaining departments could be expected to have spent similar proportions on administration. Estimating conservatively, if we assume approximately 20% of the total expenses were administrative, $41 million would be a reasonable estimate of total marketing organization administrative expense. The remaining $167 million represents total marketing organization non-administrative expenses. ABI's share of total non-administrative expenses was about $40 million in 1981. Assuming further that administrative expenses were incurred in the same proportion as non-administrative expenses, ABI's share of administration should be approximately $9.8 million for 1981 for the three marketing departments. The staff will further analyze these departments to determine ABI's proper share of administrative expenses for all three years in question. AT&T is invited to submit to the staff its own data on this question.

72. The $86,000 supervisory loading for Residence Marketing used in the para. 105 report seems clearly insufficient since it only represents a proportionate share of sixth and seventh level management. In addition, the loading factor used for other corporate overhead expenses in the para. 105 reports does not include internal departmental administration. This expense should be allocated proportionately between regulated and unregulated activities. The staff recommends that administrative expenses for the marketing departments and any other of the General Departments which contributed to ABI formation or CPE development be recomputed according to the method described above. The additional dollars should be reported in the next para. 105 filing.

C. *Summary of Work to be Completed*

73. Work to be completed in the audit of CPE development and subsidiary formation expenses includes:

a) Review of AT&T responses to BDPs selected by staff as at least partially reportable but previously unreported by AT&T (paras. 34–44, *supra*);

b) Further examination of BDPs in departments with subsidiary formation responsibility to determine the extent of charges made to reportable formation BDPs (this would include the General Departments tax, legal and ASD departments at a minimum) (para. 26, *supra*);

c) Analysis of Business Services and Business Marketing (General Departments 25 and 26) to separate administrative expenses (paras. 70–72, *supra*);

d) Completion of staff review of General Departments non-license contract billings and direct BTL billings to the BOCs that appear to be related to CPE development or subsidiary formation (paras. 8 and 59, *supra*);[13]

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[12] The administrative division of the Residence Marketing Department spent approximately $9 million in 1980 and $14 million in 1981. This division is responsible for personnel, planning, financial analysis and administration for the Residence Marketing Department. These administrative functions accounted for nearly 20% of the total departmental expense in 1980 and approximately 30% in 1981. The supervisory loading applied in the para. 105 report for the Residence Marketing for CPE was only $86,000 through 1981.

[13] The staff recommends that AT&T request its independent auditors to perform this reconciliation. The auditors' report on the results of that reconciliation should be provided to the Commission staff no later than April 30, 1983. The auditors' work papers should be made available for inspection by the Commission staff when the report is filed.

e) Reconciliation of license contract billings through December 31, 1981 to AT&T general books, and develop the extent to which preoperational and formation expenses were excluded from license contract billings (para. 8, *supra*);

f) Testing components of General Departments overhead pools for potential direct preoperational expenses, and verification of allocation algorithms used to distribute overheads (para. 8, *supra*);

g) Examination of subsidiary formation expenses identified by BTL, but not yet included in para. 105 reports (para. 67, *supra*); and

h) Testing of New York Telephone Company for expenses reported and the extent of subsidiary formation efforts. (paras. 13 and 21, *supra*).[14]

74. In the *CPE Capitalization Order*, para. 54, the Commission noted that AT&T has taken a different approach for CPE development expenses incurred by the BOCs, WECO and AT&T than it has taken for those incurred by BTL. In order to made the reporting more consistent, the Commission directed AT&T to account for all expenses incurred by the BOCs, WECO and AT&T after May 2, 1980 that relate to post May 2, 1980 BTL activities included in the preoperational expenses.

75. AT&T is in the process of reviewing its records and BDPs to estimate the increased expenses to be reported. The staff will have to review AT&T's results. These results may alter the findings described in other parts of this report.

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[14] Approximately 20% of the $7 million in subsidiary formation expenses reported by the BOCs were incurred by New York Telephone Company. The staff may also review subsidiary formation expenses incurred by other BOCs, including the C&P Telephone Company. Oversight of expenses incurred by the BOCs is, of course, substantially a responsibility of the state regulatory agencies. By reviewing New York Telephone or any other BOCs the Commission staff does not intend to relieve the states of their responsibilities to oversee BOC expenses, nor does the Commission in any way warrant that all such BOC expenses were proper.

Common Carrier, in National Defense
Disaster Communications Service
Emergency
Government Communications
Rules, Waiver of
Telephone Company, Sale of Equipment

Temporary waiver of Computer II rules granted to permit Department of Defense and other specified government agencies to continue to obtain new customer premises equipment in emergencies or to meet national defense and emergency preparedness needs from AT&T Long Lines or the BOCs until the divestiture of the BOCs.
–AT&T Co.

FCC 83–143

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations With Respect to the Department of Defense and Specified Government Agencies	ENF 83–13

MEMORANDUM, OPINION AND ORDER

(Adopted April 7, 1983 Released April 12, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ABSENT.

1. On January 5, 1983, the American Telephone and Telegraph Company ("AT&T") petitioned the Commission to waive the *Computer II* rules[1] to enable the Bell Operating Companies ("BOCs") and the Long Lines Department of AT&T ("Long Lines") to provide limited amounts of new customer premises equipment ("CPE") to the Department of Defense ("DoD") and certain other specified government agencies when necessary to meet critical national security and

[1] 47 C.F.R. §64.702. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), further reconsideration, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3676 (U.S. February 9 and 10, 1983) (Nos. 82–1331 and 82–1352).

emergency preparedness communications requirements. AT&T filed its petition at the request of, and on behalf of, DoD and other specified government agencies. The specified government agencies joining in this request are the Departments of Energy, Interior, Transportation/FAA/Coast Guard, the General Services Administration, the Central Intelligence Agency, the National Aeronautics and Space Administration, the U.S. Information Agency, the Nuclear Regulatory Commission and the Federal Emergency Management Agency (FEMA).[2]

2. The waiver is requested for a limited time, until divestiture of the BOCs pursuant to the Modification of Final Judgment (MFJ).[3] As AT&T has implemented our *Computer II* separate subsidiary requirement for deregulated CPE, the BOCs and Long Lines are currently precluded from meeting DOD's needs if embedded CPE inventory is inadequate. AT&T has established American Bell Inc. as the corporate subsidiary to market new CPE for the Bell System. After divestiture pursuant to the MFJ, the BOCs will have the option of reentering the CPE market and could at that time provide deregulated CPE to DoD and other customers.[4] Thus for the period prior to divestiture, AT&T seeks a waiver to permit DoD to deal directly with the BOCs and AT&T Long Lines in emergency situations where the provision of new CPE may be required. We have concluded that a waiver is justified but that it should be narrower than originally requested by AT&T and DoD.

3. AT&T requests the transitional waiver for three sets of circumstances:

> First, in cases of Presidentially declared disasters and emergencies;
>
> Second, in emergency or crisis situations not formally declared by the President; and
>
> Third, with respect to critical national security communications systems and circuits.

In emergencies, AT&T states, it is critical to continue to allow DoD and the specified government agencies to turn to a single point of contact which will be responsible for providing without delay, and managing, all the necessary communications facilities and CPE on an end-to-end basis. Furthermore, it is claimed that this end-to-end

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[2] DoD Statement in Support of Petition for Waiver, at 1, n. *; DoD Reply Comments, at 1, n. *.

[3] U.S. v. American Telephone and Telegraph Co., Civ. Nos. 74–1698 and 82–0192, 47 Fed. Reg. 40,392 (D.D.C. 1982), *aff'd sub nom.* Maryland et al. v. United States, Nos. 82–952, 82–953, 82–992 and 82–1001, 51 U.S.L.W. 3628 (U.S. March 1, 1983).

[4] The Commission is presently considering whether the divested BOCs should be subject to the Computer II structural separation requirements. Notice of Proposed Rulemaking, FCC 83–71, released March 4, 1983. If the Commission decides to impose the separate subsidiary requirements on the BOCs, we expect that the government agencies will make appropriate arrangements to procure CPE consistently with that requirement well in advance of the divestiture of the BOCs.

management capability is necessary to ensure the continued operation of certain critical national security communications systems such as the Strategic Air Command Primary Alert System and the North American Air Defense Command Alerting System.

4. AT&T states that only a small amount of new CPE would actually be provided under the requested waiver. Embedded inventory will be used until depleted. In addition, AT&T states that most of the government's requirements for new CPE can be satisfied in compliance with the *Computer II* rules, and according to federal statutes and procurement regulations requiring competitive purchasing practices wherever feasible.[5] New CPE will be provided under the waiver only in the three situations described above, AT&T states, and only where needs cannot be met with CPE from embedded inventories. It will be used only on communications systems qualifying for restoration priority under the Commission's restoration priority rating system (*see* 47 CFR §64.401) and only where sole source procurement would be justified under applicable procurement regulations.

5. In support of the waiver request, DoD stresses its claim of need in an emergency to be able to turn to a single entity to provide end-to-end communications services. Due to the urgency of time in emergency situations, it would be unreasonable, DoD states, to require the government agency itself to attempt to contact and coordinate multiple suppliers. Furthermore, regarding critical national security communications systems, DoD argues that a single supplier is necessary to ensure maximum performance, compatibility of equipment and comprehensive system coverage.

6. Four parties filed comments regarding the waiver request. FEMA states that any waiver should be structured so as to avoid giving any carrier a competitive advantage. Tone Commander Systems, Inc. and Valcom Corporation propose expanding the waiver to permit the BOCs to provide new CPE to all customers until divestiture. GTE service Corporation opposes granting of a "blanket waiver." It notes that national security and emergency preparedness do not necessarily require sole source procurement. It proposes that DoD and the other government agencies list the systems they regard as critical to national defense and emergency preparedness and that they submit the list to the FCC for review. GTE argues that any waiver should be restricted to the systems listed. It points out that companies other than AT&T have the capability of providing communications services to DoD.

7. The Department of Justice ("DoJ") states that it does not oppose a waiver for Presidentially declared emergencies or for other genuine crisis situations.[6] For the other, non-emergency situations,

[5] *See* 10 U.S.C. §§2301 *et seq.*, and 41 U.S.C. §§252–53.

however, where there is no practical alternative to obtaining new CPE from the service provider, DoJ suggests that a waiver should be granted only if made subject to certain conditions and procedures which it describes as follows:

> Wherever applicable procurement regulations would permit the specified government agencies to justify sole-source procurement of a particular piece of equipment, the specified government agencies would retain and exercise the discretion to select the particular equipment, and designate their service provider (a BOC or Long Lines) as their representative to obtain and supply the new CPE. Title could reside in the specified government agencies, or alternatively, the BOC or AT&T Long Lines could own this new CPE, but would not be allowed to include it in its embedded rate base.

DoJ Comments, 5 (February 3, 1983) [footnote omitted]. DoJ states that retaining in the government agencies the discretion to choose the equipment supplier would minimize conflict with *Computer II*.

8. In each such transaction, DoJ suggests, the service provider should be required to file with the Commission for public inspection a description of the transaction and a copy of the federal agency's sole-source justification. Public inspection of these documents, DoJ states, would discourage abuse of the *Computer II* waiver.

9. Four parties filed reply comments. MCI Telecommunications Corporation argues that grant of the waiver would effectively postpone for a year or more its opportunity to serve the government market. Furthermore, MCI argues, the waiver request is overbroad, fails to indicate the specific provisions of the rule sought to be waived, fails to specify the types and amounts of CPE involved, and fails to satisfy public interest concerns regarding the anticompetitive effects of sole source procurement. MCI states that since 59% of DoD procurement is on a sole source basis, a "limitation" to those situations is meaningless.

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[6] DoJ proposed that these "other crisis situations" be defined as in Defense Communications Agency Circular 310–130–1, Chapter II, Paragraph 2 (February 1982):

> d. Submission of Communications Requirements for Emergency service
>
> (1) Communications requirements resulting from any of the below circumstances may be submitted as emergency requirements and afforded special handling:
>
> (a) State of crisis declared by the national command authorities.
>
> (b) Efforts to protect endangered U.S. personnel or property.
>
> (c) Enemy action, civil disturbance, national disaster, or any other unpredictable occurrence that has damaged facilities whose uninterrupted operation is essential to national security or other ongoing crisis.
>
> (d) The director of a federal agency, commander of a unified/specified command, head of a MILDEP, or commander of a major command, e.g., TAC, COM 2ND FLT, etc. (CINCEUR ONLY IN THE EUROPEAN AREA), has certified that a communications requirement is so critical to protection of life and property or to the national defense that it must be processed immediately.

10. GTE notes that the DoJ comments support a waiver only under limited circumstances and subject to certain conditions. GTE agrees with DoJ's conclusion that the petition is not an attempt to obtain a waiver of the *Computer II* finding that CPE should be deregulated. It argues, therefore, that any waiver should not permit continued provision of CPE subject to tariff regulation.

11. AT&T rejects as impractical GTE's suggestion that the waiver only apply to a pre-certified list of critical systems. AT&T supports DoD's proposal to use the Commission's restoration priority rating system as a waiver criterion to assure that critical national security systems and circuits are identified. AT&T states that, rather than restricting DoD procurement to AT&T or the BOCs, grant of the waiver would merely permit DoD to use Long Lines or the BOCs when its needs could not adequately be met any other way.

12. In its reply comments, DoD describes an approach to granting of a waiver under the guidelines suggested by DoJ. That approach would operate as follows:

> For "emergency" situations as defined in DCA Circular 310–130–1, DoD or a specified Government agency could turn to AT&T Long Lines or a BOC whenever deemed necessary, and service involving new CPE would be provided as it is today (i.e., under tariff and added to the embedded base).
>
> For those other situations in which sole source procurement of service involving new CPE is warranted under applicable regulations, DoD or a specified Government agency could turn to AT&T Long Lines or a BOC in the same manner they do today. Thereafter, if the service cannot be provided with CPE from the embedded base, Long Lines or a BOC will so notify the affected Government agency, specifying both that CPE which is unavailable from the embedded base and one or more suppliers where such CPE is available. The affected Government agency will then determine from which supplier Long Lines or the BOC will obtain the new CPE in question and advise Long Lines or the BOC, which will then obtain the CPE and provide or be responsible for it as part of an end-to-end service to the U.S. Government in the same operational fashion as is done so today. Title to new CPE provided under these circumstances could, however, reside either with the Government, Long Lines, or the BOCs, but if Long Lines or a BOC possesses ownership it cannot be provided under tariff or added to the embedded rate base. In each of these situations the affected Government agency will provide a copy of its sole source justification to the service provider, for submission as part of the required "transaction description".

DoD Reply Comments, 4 (February 16, 1983) [footnote omitted]. DoD states that this approach would be adequate to meet national security and emergency preparedness needs.

Discussion

13. DoD has described two fundamental needs in providing emergency services and maintaining critical national security communications systems for a limited time period: first, a need, in emergency situations where time is of the essence, to be able to turn to a single entity to obtain end-to-end communications services including any necessary CPE; and second, a need to assure the continued availability of new CPE for critical national security

systems. DoD is seeking, through this waiver petition, to preserve the option of turning to AT&T Long Lines or the BOCs to meet these needs for a transitional period until AT&T divests the BOCs pursuant to the Modification of Final Judgment in *U.S. v. American Telephone and Telegraph Co.*

14. Based on the showing made by AT&T and DoD and the comments filed by other parties, we find that the public interest favors grant of a waiver along the lines of DoJ's comments. That waiver, however, must be narrower than that originally requested and must be subject to certain conditions.

15. We shall adopt the approach suggested by DoJ and DoD with one significant change: we see no need for any CPE obtained under this waiver to be provided under tariff or added to the embedded rate base (or regulatory revenue requirements) of the service provider. The policy of *Computer II* is that ratepayers should not bear costs associated with provision of new CPE. Furthermore, additions of CPE to the embedded base under this waiver would complicate the already difficult process of detariffing the embedded CPE. *See Notice of Inquiry* (CC Docket No. 81–893). The purposes of the waiver can be accomplished without adding new CPE to the embedded base. Thus, any new CPE that is provided according to this waiver, and any expenses incurred in its provision, must be accounted for separately from CPE which is in the embedded base and must be treated for accounting purposes in "below the line" accounts.

16. In the case of Presidentially declared emergencies and other emergencies as defined in DCA Circular 310–130–1, therefore, DoD and the specified government agencies may continue to turn to AT&T Long Lines or a BOC if necessary to obtain service, including new CPE if CPE is not available from the embedded inventory. For other situations, where sole source procurement is justified, DoD and the specified government agencies may also continue to obtain service from AT&T Long Lines or the BOCs. In that case, however, if the necessary CPE is not available from embedded inventory, Long Lines or the BOC must notify the government agency of that fact and identify the CPE which is unavailable. DoJ proposed that Long Lines or the BOC then identify "one or more suppliers" who might be able to provide the CPE in question. The government agency would retain the discretion to specify the CPE supplier. Consistent with the spirit of DoJ's proposal, in these situations we require Long Lines and the BOCs to identify at least one supplier other than an affiliate which can supply the CPE in question (unless, within their knowledge there

is no unaffiliated source). Long Lines or the BOC may then obtain the new CPE from the supplier selected by the government agency[7] and be responsible for it.

17. In both situations, title to any new CPE provided according to this waiver may reside in the government agency, in Long Lines or a BOC or in the third party CPE supplier. No CPE provided under this waiver, however, may be provided under tariff or added to the embedded rate base. The government agencies, the service providers and the CPE suppliers are to free to make any suitable arrangements for procurement of CPE—outright sale, lease, sale and buyback, or any other arrangement—as long as those arrangements do not result in adding equipment to the rate base of any carriers or in adding costs to revenue requirements for ratemaking purposes.

18. We stress that this waiver is temporary. It will expire immediately on the date of divestiture of the BOCs pursuant to the Modification of Final Judgment. After that date, any provision of new CPE to DoD or any of the other agencies included in this waiver must be in compliance with the requirements of *Computer II* and any Commission decision rendered in the interim which may affect the structure under which the divested BOCs provide new CPE.

19. Accordingly, we conclude that the public interest in defense and emergency communications, 47 USC § 151, would be served by grant of a temporary waiver as previously limited. This waiver does not change the *status quo*. It merely has the effect of changing the effective date of certain of the requirements of our *Computer II* rules as they apply to the affected parties. *Waiver*, 70 FCC 2d 1354, 1356 (1978).

20. IT IS THEREFORE ORDERED, pursuant to Section 1.3 of the Commission's Rules and Regulations that AT&T's Petition for Waiver IS GRANTED to the extent described herein. This waiver SHALL TERMINATE UPON DIVESTITURE OF THE BELL OPERATING COMPANIES. We expressly conclude that this ruling shall have no effect upon applicable procurement regulations governing the subject agencies.

21. IT IS FURTHER ORDERED that AT&T shall provide quarterly reports to the Chief, Common Carrier Bureau on the types and quantities of new CPE provided by AT&T Long Lines and the BOCs pursuant to this waiver. These reports shall be filed no later than thirty days after the close of any calendar quarter beginning with the quarter ending June 30, 1983.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[7] Nothing in this order is intended to limit the government agencies' selection of CPE suppliers to those identified by a Long Lines or a BOC. The agencies are free to choose any suppliers who can meet their CPE needs.

Coverage, Principal City
Remand from Court of Appeals
Site Location, Change of
Studio Location, Main
Suburban Community 307(b) Issue, FM Station

Grant of applications for new transmitter locations affirmed in light of Commission abolition of suburban community. *Berwick* and *de facto* reallocation policies where compliance with licensing rules—provision of requisite signal to community of license, location of main studio in community, and programming proposal that will serve needs of community of license—supports presumption of intention to serve designated community.
–Ben Lomond B/cing Co.

FCC 83–99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BEN LOMOND BROADCASTING Co. (KZAN) Ogden, Utah	File No. BPH-8, 473- KZAN(FM)
Req: 97.9 MHz, Channel No. 250 49 kW (H&V), 700 feet (Amend. to 25 kW (H&V);3,650 feet)	
KDAB, INC. (KDAB) Ogden, Utah	File No. BPH-10, 056- KDAB(FM)
Has: 101.1 MHz, Channel No. 266 100 kW (H&V), 700 feet	
Req: 101.1 MHz, Channel No. 266 25 kW (H&V); 3,740 feet	
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted: February 25, 1983; Released: March 14, 1983)

BY THE COMMISSION:

1. The Commission has before it: (i) the above-referenced applications for construction permits, which were subject to petitions to deny filed by Carman Corporation (Carman) and Communications

Investment Corp. (CIC), licensees of stations KLUB AM-FM and KALL AM-FM, Salt Lake City, Utah, respectively; (ii) the opinion of the United States Court of Appeals, District of Columbia Circuit, in *Communications Investment Corp. v. FCC.*, 641 F.2d 954 (1981), as amended by Order of the Court, which reversed the Commission's actions granting the applications[1], and remanded the cases for proceedings consistent with the opinion; (iii) statements and replies submitted by the applicants and the petitioners in August and September 1981 at the Commission's request; (iv) a joint petition on remand filed by Carman and CIC; and (v) related pleadings and correspondence.

2. As set forth more fully in our earlier orders and in *Communications Investment Corporation*, the applicants sought transmitter sites for two Ogden FM stations—KDAB and KZAN—at the Farnsworth Peak antenna farm, located in the Oquirrh Mountains, 18 miles west of Salt Lake City but 41 miles southwest of Ogden. The petitions to deny alleged that the proposals violated the Commission's *Berwick* doctrine[2], which questions the applicant's true intent to serve its community of license when the transmitter location is close to a larger market, and *de facto* reallocation policy, an attempt to utilize the channels assigned to Ogden to establish broadcast service in Salt Lake City, and thereby deprive Ogden of service from the channels specified. In granting the applications and denying the petitions, the Commission found that petitioners had failed to raise a substantial and material question of fact that required an evidentiary hearing on either the *Berwick* or *de facto* reallocation issues. The Commission found no basis for the arguments that KDAB would fail to provide a local service to Ogden from the Farnsworth Peak site. The Commission also concluded that KDAB had adequately documented the unavailability of alternative sites that could cure severe multipath interference problems experienced at its existing site, and that petitioners had failed to substantiate the availability of other sites. With respect to KZAN, the Commission held the KDAB decision dispositive of the matters raised by CIC.

3. Based upon its analysis of previous FCC decisions, the reviewing Court identified certain factors it believed the Commission has in the past considered relevant to a determination of intent with respect to *de facto* reallocation and *Berwick* issues, and rejected the Commission's determination that, applying these factors to the present cases, no substantial and material questions of fact existed.

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[1] The applications were granted in *D&B Broadcasting Co. (KDAB)*, 67 FCC 2d 570, 42 RR 2d 589 (1978), *recon. den.. D&B Broadcasting Co.* (KDAB), 69 FCC 2d 1116, 43 RR 2d 551 (1978), and *Ben Lomond Broadcasting Co. (KZAN)*, 68 FCC 2d 1331, 43 RR 2d 1598 (1978).

[2] *Berwick Broadcasting Corp.*, 12 FCC 2d 8, 12 RR 2d 665 (Rev. Bd. 1968); 20 FCC 2d 393, 17 RR 2d 884 (1969); *sub nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546, 27 RR 2d 311 (Rev. Bd. 1973).

However, the Court recognized that "the Commission, by modifying its policies and practices could affect the nature and extent to which an evidentiary hearing is required." *Id.* at 978–9. Thus, the Court acknowledged the Commission's discretion to resolve by general rulemaking broad policy issues that otherwise would arise in successive adjudicatory proceedings and noted that the FCC might wish to proceed in that manner with respect to the instant cases. *SEC v. Chenery Corporation*, 332 U.S. 194 (1947); *Report and Order in Docket No. 14711 (Amendment of Multiple Ownership Rules)*, 29 Fed. Reg. 7535, 2 RR 2d 1588 (1964).

4. On July 1, 1982, the Commission published its *Notice of Proposed Rulemaking in BC Docket 82–320*, 47 Fed. Reg. 29282, which instituted a rulemaking proceeding to reexamine the purpose and necessity for its suburban community, *Berwick* and *de facto* reallocation policies in light of the Court's remand in *CIC* and the requirement of Section 307(b) of the Communications Act of 1934, as amended, that the Commission "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In its *Report and Order in BC Docket 82–320*, adopted February 17, 1983, the Commission concluded on the basis of the record adduced in the rulemaking, that stations in larger communities frequently use these policies to impede the establishment or improvement of competing stations in nearby smaller communities, and thereby frustrate the objectives of Section 307(b). The Commission was also convinced that the *de facto* reallocation policy has too frequently been invoked by existing stations to preclude additional competition. In addition, the Commission noted that FM is a mature, thriving broadcast service today, well dispersed throughout the United States, and does not now require such policies designed to foster and facilitate its development. Accordingly, the Commission determined that the public interest would be better served by abolishing the subject policies, and that in circumstances where applicants are in compliance with the licensing rules—provision of the requisite signal to the community of license, location of the main studio in the community, and a programming proposal that will serve the needs of the community of license—it will be presumed that the applicant intends to serve the designated community. *Report and Order*, para 38.

5. Applying these new criteria to the instant case, we note that during the period since KDAB was relocated to Farnsworth Peak and since KZAN commenced operations at that location, both KDAB and KZAN have complied with their representations to the Commission. The applicant's compositional studies and ascertainments of needs and interests have been directed to Ogden. Both stations have aimed the bulk of their public affairs, news and public service

programming at Ogden subjects and Ogden listeners. Both stations' studios and business offices are in Ogden.[3] With respect to primary signal coverage of Ogden, both stations provide the required signal.[4] Based upon these factors, which demonstrate service to the community of license consistent with our licensing rules, we conclude that the transmitter locations proposed by KZAN and KDAB comport with the mandate of Section 307(b) of the Act, and no substantial or material questions of fact therefore remain that require an evidentiary hearing or which should otherwise disturb the grants of the construction permits at issue.[5]

6. Accordingly, IT IS ORDERED, That the petitions to deny and the joint petition on remand filed by Communications Investment Corp. and Carman Corp., ARE DENIED.

7. IT IS FURTHER ORDERED, That the above-captioned applications ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

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[3] Joint Comments on FCC Action on Remand, filed by KDAB and KZAN, August 3, 1981, Para. 62.

[4] Carman alleged for the first time in a reply pleading that KDAB would not provide the required minimum signal to the entire city of Ogden. According to Carman's allegation, KDAB would provide primary signal coverage to all but 0.4 square miles of that city and 99% of the population. It would provide a signal only 1 dbu below the required standard (70 dbu) to the remaining 1% of the population. In our original orders we concluded that even if Carman's allegation was true and had been timely raised, it presented a *de minimis* shortfall and that under the circumstances, waiver of the rule would be appropriate. (69 F.C.C. 2d at 1121 n.14) Neither Carman nor CIC has presented any further evidence to lead us to conclude that our initial determination was incorrect. We adhere to it in this order.

[5] We noted in our original order that the public interest detriment that would result from the creation of a small loss area as a result of KDAB's transmitter relocation was outweighed by the significant public interest benefits of the move. (67 F.C.C. 2d at 573 n.10) There is no factual dispute that would warrant a hearing on this issue, and additional information on the loss area submitted by the applicants in their August 1981 Joint Comments, which is undisputed by the petitioners, confirms our original conclusion.

Control, Concentration of
Diversification, of Control of Mass Media
Financial Qualifications, Loan Commitment, Ability to Meet
Local Residence, see also Comparative Criteria
Ownership and Management, Integration of
Power Equipment, Auxiliary

Review Board affirms FM grant where credit due 100% female ownership integration proposal, combined with past local residence credit, overcomes opponent's previous broadcast experience, proposed future residence, and very slight comparative coverage preference. Auxiliary power proposals are deemed equal, and ALJ properly declined to add real party in interest or regional concentration of control issues.
–*Cannon's Point Broadcasting Co.*
BC Docket No. 81–306

FCC 83R–22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CANNON'S POINT BROADCASTING COMPANY St. Simons Island, Georgia	BC Docket No. 81–306 File No. BPH-800714AK
JAMES U. STEELE St. Simons Island, Georgia	BC Docket No. 81–307 File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	BC Docket No. 81–309 File No. BPH-801003AF
For Construction Permit for a New FM Broadcast Station	

Appearances

Jerrold D. Miller, on behalf of Cannon's Point Broadcasting Company; *Stuart A. Shorenstein*, on behalf of James U. Steele; *Robert S. Stone*, on behalf of Dale Bell; and *Charles W. Kelley* and *Stephen T. Yelverton*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

Decision

(Adopted: March 18, 1983; Released: March 29, 1983.)

Board Member Jacobs for the Review Board:

1. This proceeding involves the mutually exclusive applications of Cannon's Point Broadcasting Company (Cannon's Point), James U. Steele (Steele), and Dale Bell (Bell) for authority to construct a new FM broadcast station to operate on Channel 224 at St. Simons Island, Georgia.[1] By Hearing Designation Order, 46 Fed. Reg. 26689, published May 14, 1981, these applications were designated for consolidated hearing on a limited financial qualifications issue (against Cannon's Point) as well as the standard comparative issue to determine which applicant would best serve the public interest.[2]

2. In an Initial Decision (I.D.), FCC 82D-58, released August 17, 1982, Administrative Law Judge (ALJ) John M. Frysiak granted the Bell application. After finding that Cannon's Point was financially qualified, he concluded that Bell was comparatively the best applicant based on determinations that: (a) Bell and Steele, which were both credited with 100% full-time integration of ownership and management, were preferred over Cannon's Point, which was awarded 87.15% quantitative integration credit; (b) Bell's qualitative attributes as an integrated female owner with past local residence were superior to Steele's attributes as an experienced broadcaster; (c) Steele merited a slight preference for comparative coverage, which was offset by Bell's slight preference for proposing auxiliary power at both its studio and transmitter sites; and (d) Cannon's Point deserved a very slight diversification "demerit."

3. The proceeding is now before the Review Board on exceptions filed by Cannon's Point and Steele and reply briefs filed by Steele, Bell, and the Mass Media Bureau.[3] The Board has reviewed the Initial Decision in light of the exceptions and briefs, the oral argument held December 17, 1982, and our examination of the record. We adopt the findings of fact in the I.D., except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the

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[1] The application of Burrows Broadcasting Company (File No. BPH-801001AA) was also designated for hearing. Subsequently, the Burrows application was dismissed at the applicant's request. Memorandum Opinion and Order, FCC 81M-4012, released December 18, 1981.

[2] Because there appeared to be significant differences in the areas and populations that would receive service from the respective engineering proposals, the Order indicated that geographic and demographic coverage would be considered under the standard comparative issue.

[3] In a short "Statement in Support of Initial Decision and Limited Exceptions," Bell excepts only to the ALJ's conclusion that Steele has no other media interests, arguing that Steele neglected to introduce the necessary evidence to meet its burden of proof on this point. Because Bell does not contend that Steele does have any other media interests, and noting that at oral argument counsel for Bell conceded that Steele's failure of proof was harmless error (Tr. 370), the exception will be denied.

Bell application will best serve the public interest, convenience and necessity.

4. *Financial Qualifications of Cannon's Point.* A limited financial issue was designated against Cannon's Point to determine the source and availability of an additional $24,539 to meet its costs for station construction and three months of operation. Hearing Designation Order, *supra*. Because Cannon's Point indicated that it would require a further $6,000 to purchase standby power generating equipment, the ALJ ruled that, to receive comparative credit for proposing auxiliary power, it must also demonstrate that it had sufficient funds to purchase the equipment. I.D., para. 37. Thus, Cannon's Point was faced with the burden of demonstrating that it had available approximately $31,000 in additional funds. The ALJ found that the applicant had adequately shown that it could rely on a $25,000 stock subscription by Mr. and Mrs. J. Wesley Cox, who in turn would borrow the $25,000 needed to make the stock purchase from Miss Betty Baell (Mr. Cox's aunt), and a $10,000 loan from Mrs. Jerome C. (Dorothy) Cox. *Id.*, paras. 36–37. He therefore concluded that Cannon's Point was financially qualified. *Id.*

5. In its exceptions, Steele argues that Cannon's Point should not be permitted to rely on these sources of funds because neither Miss Baell nor Mrs. Cox has sufficient current and liquid assets to meet her respective loan commitment and because the "earmarking" of the funds specifically for use by Cannon's Point is inadequate assurance that they actually will be available to it since both Cox families are technically close to financial insolvency. In reply, the Bureau asserts that the ALJ correctly found Cannon's Point to be financially qualified because the individuals making the loans have adequate financial wherewithal to provide the funds and are requiring that the loan proceeds be used by Cannon's Point only. We will affirm the ALJ's conclusion that Cannon's Point is financially qualified.

6. Miss Baell's balance sheet indicates that she has net current assets "in excess of $50,000" (Cannon's Point Exh. 1, p. 3) but the hearing record establishes only $43,000 of this amount (Cannon's Point Exh. 1B and Tr. 90) and she testified that she has about $16,000 per year in current liabilities. Tr. 77–80. Nevertheless, this leaves current assets exceeding current liabilities by $27,000, which is sufficient to meet Miss Baell's $25,000 loan commitment.[4] The

[4] Steele obliquely questions in note 25 of its Brief the adequacy of Miss Baell's showing, referencing his analysis in his proposed findings and conclusions. Neither this "exception" nor Steele's cited analysis amounts to more than speculation and quibbling about details. *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1093, 50 RR 2d 1251, 1254 (Rev. Bd. 1982). And the Mass Media Bureau has apparently resolved its previous concerns in Miss Baell's favor. See Bur. Brief, note 4. Steele's "exception" will be denied. Section 1.282(b)(2) of the Commission's Rules, 47 CFR 1.282(b)(2). Similarly, we will deny Steele's exception to the ALJ's

Bureau supports the ALJ's application of the rationale of *Contemporary Television Broadcasting, Inc.* (Hearing Designation Order), Mimeo No. 05812, 46 Fed. Reg. 9202, published January 28, 1981, to Miss Baell's loan commitment. In that case, the Bureau held that where a bank has earmarked a loan specifically for station construction, it is not necessary to rely on the recipient's financial statement in order to determine whether the bank loan will be available; "it is reasonable to assume that the loan will be made available only for the stated purpose." *Id.* Here, Miss Baell earmarked her commitment (Cannon's Point Exh. 1, p. 5), and the Bureau maintains (Brief, p. 7) that the new processing policy that it announced in *Contemporary* is equally applicable because "As long as the party making the loan has the financial ability to provide such funds, it should make no difference whether that party is a bank or an individual." We affirm the ALJ's interpretation of *Contemporary* as supported by the Bureau charged with the new policy's administration. While Steele argues that a distinction should be drawn between bank loans and private loans (because in bank financing there are "adequate built-in assurances in the usual course of business to satisfy the Commission" (Brief, p. 43) that earmarked funds will in fact be used for station construction and here we are faced with "unsecured inter-family borrowing" (Brief, p. 44)), the Bureau rejects this distinction, and so do we. It is clear that the underlying rationale of *Contemporary* is that earmarking representations made to the Commission will be honored by both the lender and the borrower, so that if the lender is shown to have the necessary funds available and the funds are specifically earmarked for broadcast construction, the financial statement of the borrower becomes immaterial. While Steele is apparently unprepared to accept the Bureau's assumption (or presumption) that non-bank earmarked funds will be properly used, "the course of the positive or civil law . . . virtually abounds in . . . legal fictions . . ., not to speak of their close kin, presumptions" (ALJ Tierney in *Muncie Broadcasting Corporation*, FCC 81M-651, released March 10, 1981), and the Commission's entire scheme of regulation is premised on our ability to depend on the accuracy and truthfulness of representations made to us. *See Country Broadcasting Company*, FCC 83R-12, 93 FCC 2d ___ (Rev. Bd. 1983), citing *Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 157, 37 RR 2d 1235, 1248 (1976). Thus, we affirm the ALJ's approval of Miss Baell as a source of $25,000 for Cannon's Point without passing on the financial state-

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refusal to broaden the designated financial issue into a general financial issue or to add a financial misrepresentation issue in Memorandum Opinion and Order, FCC 82M-0722, released March 5, 1982. We agree with the ALJ's conclusion that Cannon's Point's hearing testimony is not at variance with its application as amended and that no evidence has been produced which calls into question the Commission's previous discussion and conclusion in the Hearing Designation Order, *supra*, that only a limited financial issue was warranted. *See Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720, 8 RR 2d 991, 995–996 (1966).

ment of Mr. and Mrs. J. Wesley Cox. *Cf. Hassayampa Broadcasting*, 92 FCC 2d 472, 52 RR 2d 1059 (Rev. Bd. 1982).

7. As to Mrs. Jerome Cox's $10,000 loan to Cannon's Point, her ability to provide the funds is evidenced by a certificate of deposit in the amount of $10,092 and a loan commitment letter dated October 12, 1981. Cannon's Point Exh. 1, pp. 6 and 7. While the May 14, 1981 statement of financial condition of Dr. and Mrs. Jerome Cox (Bur. Exh. 1) puts their current liquid assets (including the $10,092 certificate of deposit) at approximate equilibrium with their current liabilities, the ALJ focused instead on their net worth of $220,067 and concluded that Mrs. Cox's certificate is not needed to meet the Coxes' current liabilities and, hence, is available to Cannon's Point as a loan. I.D., para. 37. While Steele asserts that "This ruling is contrary to years of precedent and cannot be sustained" (Brief, p. 41), Steele is clearly wrong. Steele does not question that the Coxes' net worth is more than $200,000 (because of some $300,000 in nonliquid assets), which is 20 times the size of the proposed loan, and the Commission has long held that "ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield" provides reasonable assurance of the ability to secure the required funds. *International Broadcasting Co.*, 3 FCC 2d 449, 451, 7 RR 2d 302, 305 (1966); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706, 51 RR 2d 389, 391 (Rev.Bd. 1982). Thus, we affirm the ALJ's conclusion that Cannon's Point can rely on Mrs. Cox's $10,000 loan and his overall conclusion that Cannon's Point is financially qualified.

8. *Diversification of Control of the Media of Mass Communications.* The ALJ concluded that neither Steele nor Bell has any "present" interests in other media of mass communications; however, Cannon's Point was assessed a "very slight" diversification "demerit" based on the fact that a 0.4% stockholder and unintegrated vice-president and director, Anne Gallion, is also publisher and editor of a weekly newspaper serving Jekyll Island, a community located about one mile from St. Simons Island. I.D., para. 38. Cannon's Point and Steele except to the ALJ's refusal to take account of the interests of Mrs. Dale Bell (Bell's sole proprietor) in three Georgia cable television systems. While they note her undertaking (Bell Exh. 1, p. 1) to divest herself of all ownership and official relationships with those cable systems upon grant of her St. Simons Island application, as did the ALJ, Steele questions the likelihood that Mrs. Bell will carry out this promise, and both Steele and Cannon's Point argue that the promise is inconsistent with Bell's financial plan, which relies on the cable stocks as collateral for her bank financing. These exceptions will be denied. Steele's misgivings about Bell's divestiture intentions are based on hearing testimony in which she indicated that she had not yet taken any steps to sell the stocks. Tr. 262–265. We do not find anything unusual or disturbing

about this testimony, coming as it did on November 17, 1981, only six months after this proceeding began and nine months before the I.D. was released. Steele's concerns are rejected as premature and speculative. *Cf. Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 44 RR 2d 127 (Rev. Bd. 1978), *aff'd*, 86 FCC 2d 423, 49 RR 2d 606 (1981), *pet. for mod. of Decision denied*, 50 RR 2d 789 (1981). As to the relationship between the proposed divestiture and Bell's financial qualifications, Bell amended her application on July 10, 1981 to include a letter from the Baxley State Bank, dated June 26, 1981, which indicates that the bank will accept as security for its loan commitment either the assignment of Bell's cable stocks or a certificate of deposit equaling the proceeds Bell would receive from sale of the stocks. This amendment was adequate to allow the ALJ to reject a proposed financial issue against Bell in Memorandum Opinion and Order, FCC 81M-2776, released September 2, 1981, and we affirm that action here. It is clear from the bank's letter that divestiture will not adversely affect its loan commitment to Bell. Finally, while Cannon's Point did not specifically except to its diversification "demerit," we will treat Ms. Gallion's multiple media interest as *de minimis* in view of her almost infinitesimal ownership interest in Cannon's Point (five shares out of 1312), her unintegrated role, the marginality of the other medium of expression (a weekly newspaper on a state park resort island—Tr. 172–4), and the fact that St. Simons Island, a much larger community, has its own weekly newspaper (I.D., para. 38). *Cf. Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 51 RR 2d 1604 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982). Hence, no applicant will receive any diversification preference or "demerit".

9. *Integration of Ownership and Management.* As sole proprietors and proposed full-time general managers, both James U. Steele and Dale Bell were credited with 100% full-time quantitative integration credit by the ALJ, and Cannon's Point was awarded 87.15% full-time credit for the 76.3% full-time integrated ownership of Mr. and Mrs. J. Wesley Cox and the 21.7% part-time (20 hours) integrated ownership of deceased principal Mrs. J. J. Baell, whose interest was purchased by the Coxes.[5] I.D., para. 39. Steele received qualitative enhancement credit for his previous broadcast experience, Bell, for her local residence and female ownership participation, and Cannon's Point, for local residence, past participation in civic affairs, previous broadcast experience, and female ownership participation. *Id.*, paras. 40–43. The ALJ eliminated Cannon's Point from integration preference contention because of the "clear quantitative difference" between its proposal and those of Steele and Bell, and gave the preference to Bell, concluding that her status as a female, coupled with her past local residence on St. Simons Island,

[5] The ALJ granted "full proportional credit of 10.85%" for Mrs. Baell's 21.7% interest by giving it 50% weight as a 20-hour proposal. I.D., para. 30 and note 7.

overcame Steele's superior past broadcast experience. *Id.*, paras. 46–47.

10. In its exceptions, Cannon's Point concedes (as it must) that the ALJ was too generous with its quantitative integration credit, and that it only deserves 76.3% full-time credit and 21.7% part-time credit. Brief, p. 11; *see New Continental Broadcasting Co.*, 88 FCC 2d 830, 838–839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981). However, the applicant then urges that it is appropriate to combine its full and part time quantitative credits into a 97.7% ownership integration total, and that the numerical difference between this total and Bell's and Steele's 100% is too slight to permit a preference to be awarded without including Cannon's Point and considering the qualitative enhancements of all three applicants.

11. A comparative integration preference may not be based on relative amounts of quantitative integration credit alone, unless there is a "clear quantitative difference." *Van Buren Community Service*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981). In addition, we have emphasized that full-time and part-time integration credit are entitled to significantly different weight. *Id.* Also see *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 52 RR 2d 1210, 1215–1218 (Rev. Bd. 1982), for an extensive discussion of the relationship between quantitative integration credit and qualitative enhancement factors. These cases make clear that lumping together full-time and part-time quantitative integration credit is contrary to the letter and spirit of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), which focuses on full-time ownership participation as the preferable integration course. In analyzing integration credit, we sometimes juxtapose full-time and part-time proposals, *see, e.g., Cleveland Television Corp.*, 91 FCC 2d 1148, 52 RR 2d 581 (Rev. Bd. 1982) (15% full-time/20% part-time proposal weighed against 50% full-time/50% part-time proposal), but each type of proposal is separately considered. Thus, we must decline Cannon's Point's request that we elide all distinctions between full-time and part-time integration proposals and, in effect, raise its integration credit to the equivalent of a 97.7% full-time proposal. We conclude that Cannon's Point's 76.3% full-time quantitative credit is sufficiently below that of Steele and Bell that the gap cannot be overcome by qualitative enhancements. *Van Buren Community Service, supra*; *New Continental Broadcasting Co., supra* (12.5% quantitative difference held "clear"). Hence, the ALJ properly eliminated Cannon's Point from integration preference contention.[6]

12. Both Steele and Cannon's Point challenge the ability of Bell

[6] Under the circumstances, we need not reach Steele's argument that the Coxes should not have been awarded any part-time quantitative integration credit, based on the late Mrs. Baell's integration proposal, and his challenge to Cannon's Point's qualitative enhancements.

to effectuate her integration proposal, asserting that her 100% integration credit should be either severely reduced or completely eliminated because her hearing testimony exhibited extreme lack of familiarity with her proposed station's policies on commercial advertising, controversial issues, political advertising, and format. Steele emphasizes that the question is not whether Bell will be physically available, but whether her proposal has any credibility and whether the applicant has the necessary abilities to carry out her duties as general manager. Lack of past broadcast experience or non-broadcast experience is not relevant to quantitative integration credit. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951–952, 50 RR 2d 1142, 1148 (Rev. Bd. 1982). A contrary approach would discourage the very newcomers to broadcasting that the *Policy Statement*, *supra*, is trying to encourage. While lack of familiarity with the proposals in one's application is a more substantial concern, we do not believe that Mrs. Bell's brief cross-examination testimony about station policies and her duties (Tr. 274, 278–279) sufficiently explored these matters to be regarded as a full or fair indication of her grasp of her application or of her proposed job, or to seriously call into question Bell's ability to effectuate her proposal. We affirm the ALJ's award of 100% quantitative integration credit to Bell.

13. As to qualitative enhancements, Steele and Cannon's Point except to Bell's local residence credit. They maintain that the *Policy Statement's* recognition of local residence as an enhancing factor, 1 FCC 2d at 395–396, 5 RR 2d at 1910, envisions a longer term residence than Bell's and a greater familiarity with the community and its needs and interests than Bell demonstrated on cross-examination. In particular, Steele observes that Bell moved to St. Simons Island in September 1979, resided there for only one year prior to filing her application, and demonstrated a "profound disinterest" and lack of knowledge concerning the proposed community of license. Steele Brief, pp. 14–15. And Cannon's Point urged at oral argument that local residence credit is based on a rebuttable presumption of local knowledge and familiarity, and that the presumption was successfully rebutted here. Tr. 314–315. Hence, according to the exceptors, Bell's *actual* local residence is entitled to no greater credit than Steele's *proposed* future residence (which is also entitled to some slight credit under the *Policy Statement*, *supra*), if any. While we agree that Bell's relatively short local residence is not entitled to the same enhancement credit as residence of "several years' duration," *Policy Statement*, *supra*, we do not agree that *Ocean County Radio Broadcasting Co.*, 4 FCC 2d 953, 8 RR 2d 695 (Rev. Bd. 1966), relied upon by Steele, supports the proposition that short term actual residence is entitled to no more credit than mere proposed residence. In *Ocean County*, we equated two years of pre-application full-time local residence with 25 years of prior residence followed by

14 years of frequent visits and proposed resumption of full-time residence.[7] In the instant case, Steele does not allege any previous residence on St. Simons Island, but Mrs. Bell testified that her parents had a summer home there to which she went ever since she was in grammer school (Mrs. Bell was born in 1951) so that it was "already . . . like a second home to me before I moved" (Tr. 267). Given this record, it is clear that Bell is entitled to greater local residence credit than Steele. As with the exceptors' integration effectuation argument in paragraph 12, *supra*, we cannot conclude that Mrs. Bell's brief cross-examination testimony on local subjects (Tr. 267, 269–272) provides a serious challenge to the slight local residence preference we are awarding. And we note that Bell is neither seeking nor receiving any credit for past participation in civic affairs.[8]

14. We turn now to Steele's extensive argument that Bell should not be awarded substantial female ownership participation enhancement credit, if any. Steele's argument is two-pronged: first, that Mrs. Bell is a "stalking-horse" for a husband-wife management team (Mrs. Bell's husband, Dewayne Bell, will be "employed" by her as assistant general manager—Tr. 294), so that Bell should receive only 50% female integration credit; and, second, that the Commission's "automatic preference for females" cannot be reconciled with its policy statement on *Minority Ownership of Broadcast Facilities*, 69 FCC 2d 1591, 44 RR 2d 1051 (1978). At the core of Steele's first argument is an abortive attempt to convince the ALJ to add a real party in interest issue in this proceeding to inquire into Mr. Bell's alleged concealed interest in the Bell application and his principal's role. FCC 81M-2776, *supra*. The only bases for the proposed issue were Mrs. Bell's youth and lack of previous broadcast experience, Mr. Bell's proposed managerial role, and a $3000 joint savings account which would finance a small portion of the station's construction costs. The ALJ correctly held that these facts were inadequate to meet the test for determining whether a third person is a real party in interest—whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station. *KOWL, Inc.*, 49 FCC 2d 962, 31 RR 2d 1589 (Rev. Bd. 1974). A family relationship alone does not warrant addition of such an issue, *Jimmie H. Howell*, 46 FCC 2d 50, 29 RR 2d 1317 (Rev. Bd. 1974), and there is no basis on this record to regard

[7] *But cf. Ottumwa Broadcasting Co.*, 92 FCC 2d 1011, 52 RR 2d 1447 (Rev. Bd. 1982), in which the Board awarded no enhancement credit for 25 year old past civic participation.

[8] Cannon's Point's further exception that Bell's *quantitative* integration credit should be greatly reduced because of her "abysmal showing of involvement" with the community of St. Simons Island (Brief, p. 14) is rejected as unsupported by the record and without case precedent. To the extent that it is an integration effectuation argument, see paragraph 12, *supra*.

the Bell proprietorship as jointly owned. *Cf. Ottumwa Broadcasting Co., supra* note 7. Steele's argument is premised only on speculation and surmise, and it fails. *See Folkways Broadcasting Co.*, 33 FCC 2d 806, 811, 23 RR 2d 992, 999 (Rev. Bd. 1972).

15. Steele's second argument attacks the policy basis for granting enhancement credit for female ownership integration, which had its genesis in *Gainesville Media, Inc.*, 70 FCC 2d 143, 43 RR 2d 604 (Rev. Bd. 1978). In *Gainesville*, the Board held that female ownership integration would promote a "public interest benefit" and was an affirmative factor enhancing an applicant's integration proposal which did not require a special showing of anticipated increased program diversity attributable to that integration or proof that females are an unrepresented or poorly represented class in the local mass media. 70 FCC 2d at 149, 43 RR 2d at 611. In so holding, the Board took account of the teachings of the U.S. Court of Appeals in *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *rehearing denied*, 495 F.2d 941, *cert. denied*, 419 U.S. 986 (1974), and the Commission in *WPIX, Inc.*, 68 FCC 2d 381, 411–412, 43 RR 2d 278, 315–316 (1978), concerning merit for minority ownership and participation. Finding a similar public interest benefit in female ownership integration, the Board felt obliged to accord similar credit, but later made it clear that "the credit awarded for female participation is less than that accorded black participation." *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 829, 45 RR 2d 1709, 1715 (Rev. Bd. 1979), *review denied*, FCC 80–734, adopted December 4, 1980.

16. The Commission appears to have endorsed this type of female enhancement credit in *Alexander S. Klein, Jr., supra*, 86 FCC 2d at 432, 49 RR 2d at 613, and, most recently, in *Waters Broadcasting Corp., 91* FCC 2d *1260*, 52 RR 2d 1063, 1069 (1982), and has denied review of a number of Board decisions over the years that have followed *Gainesville Media, Inc., supra. E.g., Midwest Broadcasting Co.*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd.), *review denied*, FCC 79–397, adopted June 21, 1979. Steele's contention that the credit is inconsistent with *Minority Ownership of Broadcast Facilities, supra*, because the latter policy statement declined to include females among "minority groups" for purposes of tax incentives and distress sale procedural relief, is incorrect. The *Minority Ownership* statement specifically declined to address the comparative hearing implications of its minority group policies, 69 FCC 2d at 1595–96, 44 RR 2d at 1057; hence, the refusal to consider females as "minorities" cannot be construed as ruling out comparative enhancement credit for females as non-minorities. Therefore, with Commission case precedent supporting the credit, Steele's request that the matter be revisited may only be properly addressed by the Commission *en*

banc.[9] Accordingly, we deny Steele's exception and affirm the ALJ's award of 100% female enhancement credit to Bell.

17. Taking into account all of the preceding integration contentions and Steele's 20-year history in the broadcast industry (I.D., paras. 19–24), we affirm the ALJ's conclusion (*Id.*, para. 47) that as between Steele and Bell, their quantitative integration credit being equal, Bell's qualitative enhancement credits for 100% female integration and past local residence "overcome" Steele's credits for previous broadcast experience and proposed future residence. While Steele's previous broadcast experience is impressive, the *Policy Statement* mandates that even such experience is "of minor significance" in the overall integration analysis, since it generally confers only an initial advantage and so as not to discourage inexperienced newcomers (such as Mrs. Bell). 1 FCC 2d at 396, 5 RR 2d at 1910.

18. *Auxiliary Power.* Each of the applicants proposed to install auxiliary power generators, but Bell proposed to use such generators at "both her studio and transmitter sites" (Bell Exh. 1, p. 2), while Steele proposed a generator as an "emergency back-up to his main transmitter" (Steele Exh. 3) and Cannon's Point proposed to "equip its radio station" with a generator (Cannon's Point Exh. 2, p. 2). Based on these differences, the ALJ awarded a very slight auxiliary power preference to Bell, citing *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966). Steele excepts to this preference, arguing that it is without precedent, since the *Addendum* does not distinguish between the quality and type of auxiliary equipment proposed but rather between those who propose some equipment and those who don't, and because the generalities of each proposal in the record allow no basis for drawing reasonable comparative distinctions. We agree on both counts, and conclude that all of the applicants are equal on this comparative factor.

19. *Petition to Enlarge Issues.* In FCC 81M-2776, *supra*, the ALJ denied a petition to enlarge issues filed by Steel, in which he unsuccessfully sought to have 11 new issues added against Bell. Some of the denied issues have already been discussed in paragraphs 8 and 14, *supra*. What remains are exceptions by Cannon's Point to the ALJ's refusal to add misrepresentation and failure-to-report issues pertaining to the nature and extent of Mrs. Bell's cable television interests, and exceptions by Steele to the ALJ's failure to add regional concentration of control or real party in interest issues to explore whether the broadcast holdings of Mrs. Bell's parents and other relatives, when added to the St. Simons Island application, would create a prohibited regional concentration or whether Mrs.

[9] We note that in *Horne Industries, Inc.*, 52 RR 2d 1009 (Rev. Bd. 1982), we certified to the Commission, as a policy question of first impression, what degree of merit should be awarded for 100% female ownership when compared with 15% minority ownership. The instant case raises a very different question which, we believe, is amply guided by existing policy and precedent.

Bell's parents are real parties in interest in the St. Simons Island application.

20. We quickly dispose of Cannon's Point's objection. In requesting the misrepresentation and reporting issues, Steele failed to make the requisite *prima facie* demonstration of deception and of a desire, motive, or logical reason to mislead, *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1180, 49 RR 2d 1001, 1007 (Rev. Bd.), *modified on other grounds*, 88 FCC 2d 620, 50 RR 2d 802 (1981), and the alleged reporting errors were not adequately shown to be substantial and potentially of decisional significance, *Radio Laredo, Inc.*, 87 FCC 2d 353, 361, 49 RR 2d 1489, 1495 (Rev. Bd. 1981), *aff'd per curiam sub nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982). Hence, the requested issues were properly denied.

21. As to Steele's exception, he essentially argues that Mrs. Bell's application is a "sham" (Tr. 401) and that she is being used as a "surrogate" for her father, Farnell O'Quinn, a multiple broadcast station owner in southeastern Georgia (Brief, p. 28). Steele sought enlargement of the issues to inquire into the interest and role of Bell's father in her application and whether the broadcast holdings or pending applications of the O'Quinn family, taken together (father, mother, sister, son and daughter), violate the Commission's rules against regional concentration of control. The ALJ denied enlargement on the ground that Steele had failed to present a sufficient *prima facie* case of common ownership or control to warrant further inquiry. In his exceptions, Steele urges that the ties between Mrs. Bell and her father as they relate to the St. Simons Island application go far beyond just the parental relationship and that, absent a full investigation of these matters at hearing, further probative evidence than has already been presented cannot be developed. As to regional concentration, he asserts that if the Commission grants Mrs. Bell's application, as well as a pending Waycross, Georgia FM application (in which Mr. O'Quinn's sister is a 50% principal) and a future FM application for Kingsland, Georgia to be filed by Mr. O'Quinn's son,[10] the O'Quinn family will control three stations in a 50-mile radius, six stations in a 100-mile radius, and a total of seven stations in the state of Georgia, as well as three Georgia cable television systems.

22. We affirm the ALJ's denial of the requested issues. A party seeking a real party in interest or regional concentration issue where family members are involved has a heavy *prima facie* burden, because the Commission is aware that even independent family relationships may have attributes, such as financial and business ties, which in non-family situations would be persuasive indicia of

[10] Report and Order, Mimeo No. 32257, 52 RR 2d 699 (MM Bur. 1982), the Commission granted Mr. F. Keith O'Quinn's petition for rulemaking and assigned Channel 292A to Kingsland.

common ownership or control or real party status. *See Alan K. Levin* (Hearing Designation Order), FCC 80–657, 45 Fed. Reg. 85512, published December 29, 1980, at para. 9. While Steele maintains that he has met the *Levin* standard by showing family relationship, close business ties, a pattern of oligopolistic and anticompetitive behavior by Farnell O'Quinn, and a motive for deception (the fact that the multiple ownership rules would not permit O'Quinn to file the subject application in his own name), we disagree.

23. In *Levin*, the Commission found that "the history of the Gayer interests and the striking parallels among supposedly independent stations and proposals suggest at least an informal family business operation revolving around the senior Gayers." *Id.*, para. 11. These factors included identical articles of incorporation, bylaws, financial structure, communications counsel, consulting engineers, and responses to questions involving five purportedly independent broadcast applications and different ownership combinations by six members of the Gayer family. Of these factors, Steele has alleged only family consanguinity and common legal counsel. He also points out that Mrs. Bell briefly worked for her father and that her father gave her the cable stock which forms the basis of her application's financial plan and continues to have his own ownership interest in the cable systems. All of the subject cable stock was transferred to Mrs. Bell between December 1973 and January 1979, and Mrs. Bell did not file her application until October 3, 1980. We do not find that these father-daughter transactions constitute the type of "close business ties" that warrant further exploration. Similarly, we decline to pursue Steele's additional charges of oligopolistic conduct by Mr. O'Quinn, since his credentials are not at issue in this proceeding, only his daughter's. We note, however, that in *Farnell O'Quinn*, 11 FCC 2d 801, 12 RR 2d 422 (Rev. Bd. 1968), cited by Steele to show that the Commission has previously expressed some concern about Mr. O'Quinn's regional broadcast holdings, the Board declined to enlarge the issues, failing to find that the stations at issue would be operated as a family unit or that O'Quinn would have some voice in the operation or control of the non-O'Quinn station. The Board there concluded, as we do here, that the nature and extent of the business relationship between O'Quinn and his relatives (there, his brothers-in-law) did not raise any serious doubt concerning the relatives' ability to operate independently of O'Quinn.

24. Simply stated, Mrs. Bell's physical and mental independence from her father are at the heart of Steele's proposed issues, and the circumstantial evidence that he has offered to show lack of independence is speculative and otherwise insufficient. *See Folkways Broadcasting Co., supra.* In this connection, we reject Steele's attempt to shift the *prima facie* burden to Bell to show that, despite family relationships, she will operate her station independently, citing *Alabama Radio Corp.*, 69 FCC 2d 1256, 44 RR 2d 465 (1978). In

Alabama, no such issue was added, and the burden was not shifted. While there are situations in which considerations of fairness argue in favor of placing even the burden of proceeding on the party with particular access to the relevant evidence, *e.g.*, *D.H. Overmyer Communications Co.*, 31 FCC 2d 203, 22 RR 2d 837 (1971), this is not one. The burden of showing that a qualified applicant is not its own man or woman but a mere "front" for another party is properly heavy in these family cases, *Alan K. Levin*, *supra*, and Steele has buckled under it.

25. Having affirmed the ALJ's decision not to explore these issues in this case, we nevertheless caution the O'Quinn family that their broadcast entrepreneurial endeavors are operating at the outer limits of what is permissible without an evidentiary hearing concerning regional concentration, but no further exploration is called for by this record. Our action herein does not preclude such inquiry in the Waycross or Kingsland proceedings (see paragraph 21, *supra*), if further *Levin*-type evidence is proffered there.

26. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. There were no exceptions to the ALJ's conclusion that Cannon's Point and Steele deserve a "very slight" comparative coverage preference over Bell, I.D., para. 44, and we affirm that conclusion. *Resort Broadcasting Co.*, 41 FCC 2d 640, 27 RR 2d 1379 (Rev. Bd. 1973). Since all three applicants are basically qualified, a choice in this case hinges on the applicants' comparative qualifications and, more particularly, on how they fulfill the primary objective of best practicable service to the public.[11] *Policy Statement*, *supra*. This objective encompasses the applicants' integration, comparative coverage, and auxiliary power showings, in that order of importance. *Id.* Thus, having eliminated Cannon's Point from integration preference contention (see paragraph 11, *supra*), it perforce finishes the comparative race in third place. We have already affirmed the ALJ's conclusion that, under the integration criterion, Bell's qualitative enhancement credits for 100% female integration and past local residence overcome Steele's credits for previous broadcast experience and proposed future residence (paragraph 17, *supra*). We must now factor in the final best practicable service ingredient of a very slight comparative coverage preference to Steele.[12] Having done so, we affirm the ALJ's ultimate conclusion that grant of Bell's application will better serve the public interest, convenience and necessity. Under the comparative circumstances of this case, Bell's 100% female integration is decisively

[11] The primary objective of diversification of control has had no winnowing effect in this case, because all three applicants have been found equal under this rubric. See paragraph 8, *supra*.

[12] The applicants were deemed equal on the auxiliary power comparative factor (paragraph 18, *supra*).

important, a conclusion which is consistent with the *Policy Statement*, *supra*, other Commission policy, and past case precedent. In paragraphs 15–17, *supra*, we elaborated on the qualitative enhancement to be attached to female ownership integration, and in *North Carolina Radio Service, Inc.*, *92* FCC 2d *621*, 52 RR 2d 993 (Rev. Bd. 1982), we recently affirmed an application grant in which the only arguable difference between the applicants was the winner's 49% female integration. Applying the principle of *Gainesville Media, Inc.*, *supra*, and its progeny, the magnitude of the enhancement credit due a 100% female integration proposal in which the female will be the station's general manager (Mrs. Bell's application) is proportionately greater here and more than ample, when combined with Bell's past local residence credit, to overcome Steele's integration enhancement credits and very slight coverage preference.

27. ACCORDINGLY, IT IS ORDERED, That the application of Dale Bell (File No. BPH-801003AF) for a construction permit to establish a new FM station at St. Simons Island, Georgia, IS GRANTED; and that the applications of Cannon's Point Broadcasting Company (File No. BPH-800714AK) and James U. Steele (File No. BPH-800930AE) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

FCC 82D-58

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CANNON'S POINT BROADCASTING COMPANY St. Simons Island, Georgia	BC Docket No. 81–306 File No. BPH-800714AK
JAMES U. STEELE St. Simons Island, Georgia	BC Docket No. 81–307 File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	BC Docket No. 81–309 File No. BPH-801003AF
For a Construction Permit	

Appearances

Jerrold Miller on behalf of Cannon's Point Broadcasting Company; *Stuart A. Shorenstein* on behalf of James U. Steele; *David Tillotson* on behalf of Burrows Broadcasting Company; *Robert S. Stone* and *Rudolph L. Ennis* on behalf of Dale Bell; and *William D. Freedman* and *Stephen T. Yelverton* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

(Issued: August 12, 1982; Released: August 17, 1982)

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of Cannon's Point Broadcasting Company (CPBC), James U. Steele (Steele) and Dale Bell (Bell). By *Order* (BC 706) released May 6, 1981, the captioned applications were designated for hearing on the following issues:[1]

1. To determine with respect to Cannon's Point Broadcasting Company: (a) the source and availability of additional funds over and above the $39,824 indicated; and

[1] The application of Burrows Broadcasting Company was also designated for hearing, but was dismissed at its own request by *Memorandum Opinion and Order* FCC 81M-4012, released December 18, 1981.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.

The *Order* noted that there would be a significant difference in the size of the areas and populations which would receive service from the proposals and provided that the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural service in such areas, would be considered under the standard comparative issue (para. 6).

2. The prehearing conference was held on July 16, 1981. Hearing sessions were held on November 16 and 17, 1981. During the hearing it was agreed that, based on questions raised by the Broadcast Bureau as to the adequacy of the parties' joint engineering exhibit, a revised joint engineering exhibit would be filed following the hearing sessions. By *Order* (FCC 82M-0228) released January 22, 1982, Joint Exhibit 1 was received in evidence and the record was closed. Proposed findings of fact and conclusions of law were filed by Dale Bell on February 2, 1982 and by the remaining parties on February 23, 1982. Replies were filed by all the parties on March 16, 1982.

Findings of Fact

A. *Limited Financial Issue*

3. A limited financial issue was specified against CPBC in the *Hearing Designation Order* because CPBC failed to show that it had sufficient funds to cover $64,363.36 in estimated expenses for the first three months of operation and construction. CPBC was credited with $30,722 in existing capital[2] and with a $9,102 bank loan. However, a $25,000 stock subscription agreement by Mrs. J. J. Baell, one of CPBC's principals, was not credited. Mrs. Baell was depending on a $25,000 loan from her daughter, Miss Betty Baell, and neither had submitted balance sheets or financial statements, as required by FCC Form 301, Section III, item 4(b) (*Order*, para. 2 and 3). Subsequently, Mrs. J. J. Baell died, and by amendment filed June 15, 1981,[3] it was reported that Mr. and Mrs. J. Wesley Cox, the main principals of CPBC, had agreed to subscribe to an additional $25,000 worth of stock. It was reported further that the funds for this purchase would come from Miss Betty Baell as a loan to J. Wesley Cox. A request for summary disposition of the financial issue was

[2] Of these funds, $21,000 are on deposit at Moultrie Federal Savings & Loan Association, Moultrie, Georgia, in a certificate of deposit #2198. The certificate originally was in the name of Mrs. J. J. Baell as trustee for CPBC. After Mrs. Baell's death, Miss Betty Baell became the named trustee for CPBC. These funds are also part of the $30,000 that Dr. and Mrs. Jerome C. Cox agreed to loan by letter which was included in the CPBC amendment filed October 2, 1980.

[3] Amendment was accepted by *Order* FCC 81M-2755, released September 2, 1981.

denied on the basis that CPBC had failed to submit a balance sheet or financial statement for Mr. and Mrs. Cox as required by FCC Form 301. It was also ruled that the balance sheet submitted for Miss Betty Baell was inadequate. *Memorandum Opinion and Order* FCC 81M-3136, released October 2, 1981. By amendment filed October 19, 1981,[4] CPBC supplied a letter from Miss Betty Baell clarifying that the full proceeds of the $25,000 loan to J. Wesley Cox could only be used for investment in CPBC. *See also* CPBC Exh. 1, p. 5. The amendment of October 19, 1981 also contained a letter from Mrs. Dorothy Baell (Mrs. Jerome Cox), the mother of J. Wesley Cox, stating that she would lend CPBC the sum of $10,000 for purposes of construction and operation of the proposed broadcast station. CPBC Exh. 1, p. 6. Finally, the amendment contained a balance sheet for Mr. and Mrs. J. Wesley Cox which was dated October 1, 1981. CPBC Exh. 1, p. 8.

4. By amendment filed February 5, 1981, CPBC indicated that it will purchase standby power generating equipment. It was estimated that it would cost $6,000. Tr. 164.

5. The balance sheet for Miss Betty Baell indicates that she has net current assets in excess of $50,000 and liabilities not in excess of $1.00. CPBC Exh. 1, p. 3. Miss Baell has approximately $90,000 worth of certificates of deposit which she has in savings and loan associations. Tr. 82. At the hearing, she produced five certificates totaling some $43,000. CPBC Exh. 1b. Although Miss Baell has no accrued liabilities, she does have ongoing monthly personal expenses and business expenses. Her personal expenses consist of rent ($250), gasoline, utilities and the like. Tr. 75–80. Monthly expenses incurred in her business of physical therapy consist of rent ($275), salary ($800) and utilities. Tr. 79–80.

6. Jerome and Dorothy Cox's financial statement indicates a net worth of some $200,000. BB Exh. 1. The financial statement of Dr. and Mrs. Jerome Cox reflects the $10,000 which Mrs. Cox will loan to CPBC. That sum is on deposit as a certificate of deposit #3269 at the Moultrie Federal Savings & Loan Association, Moultrie, Georgia, and has been earmarked by Mrs. Cox as a loan for CPBC. CPBC Exh. 1, p. 7. The full proceeds of this loan will be available to CPBC, as no payments of either principal or interest will be due during the first three months of station operation.

B. *Comparative Issue*

7. *Cannon's Point Broadcasting Company.* CPBC is an applicant for an FM radio station at St. Simons Island, Georgia. Its officers, stockholders and directors are as follows:

[4] Amendment was accepted by *Order* FCC 81M-3598, released November 12, 1981.

Name and Address	*Number of Shares*	*Office*	*Director*
Mr. and Mrs. J. Wesley Cos Joint Tenants St. Simons Island, Georgia	1,286 (held and subscribed)		
J. Wesley Cox St. Simons Island, Georgia		President	Yes
Mrs. J. Wesley Cox St. Simons Island, Georgia		Secretary	Yes
J. Wesley Cox, Jr. St. Simons Island, Georgia	1		
Dr. Jerome C. Cox Moultrie, Georgia		Vice President	Yes
Mrs. Jerome C. Cox Moultrie, Georgia		Treasurer	Yes
Dr. Frederick C. Marland Darien, Georgia	10	Vice President	Yes
Sarita Carmen Marland Darien, Georgia	10	Asst. Secretary	Yes
Anne Gallion Jekyll Island, Georgia	5	Vice President	Yes

CPBC Exh. 2.

8. With one slight exception, neither CPBC nor any of its principals have any connection with any medium of mass communication. The exception is Anne Gallion (holder of five shares or less than 0.4%), who is the publisher and editor of a weekly newspaper serving Jekyll Island, Georgia, a community located about one mile from St. Simons Island. Tr. 171–2.

9. The principals of CPBC who will be active in its proposed radio station are J. Wesley Cox and Mrs. J. Wesley Cox. CPBC Exh. 3 and 4. Mr. Cox will be the general manager of the station on a full-time basis, and Mrs. Cox will be the station's operations manager, also on a full-time basis.

10. As of the cut-off date for changing the comparative qualifications of the applicants, CPBC was proposing that Mrs. J. J. Baell was to be the sales manager of the station, working a minimum of 20 hours per week. Tr. 213. She was to hold a total of 285 shares of CPBC stock, with Mr. and Mrs. J. Wesley Cox holding 1001 shares. Tr. 175. Subsequent to the cut-off date, Mrs. Baell passed away and her stockholdings in CPBC were taken over by Mr. and Mrs. Cox. No other principal of CPBC will be active in the station on a daily basis.

11. J. Wesley Cox has lived in Georgia all his life, and has resided in St. Simons Island since 1979. He attended Valdosta State

College in Valdosta, Georgia. While there he edited the student newspaper and was active in the student television show. He has worked as an announcer, news director and account executive for WZZZ, West Point, Georgia, from December 1, 1977 to August 13, 1979; as announcer and account executive at WLAG, LaGrange, Georgia, from August 13, 1979 to November 21, 1979; and as account executive at WAPE, Jacksonville, Florida, from December 11, 1980 to March 20, 1981. At St. Simons Island, he is involved in the following civic and community groups: Chamber of Commerce; Exchange Club, member of board of directors; Island Players; Coastal Georgia Historical Society; and past member of Brunswick-Glynn County Clean Community Commission. CPBC Exh. 3.

12. Mrs. J. Wesley Cox has also lived in Georgia for all of her life, although she was born in Jacksonville, Florida. She received a bachelor of fine arts degree from Valdosta State College in 1974. After graduating she worked as an advertising and display person during 1975 and did paste-up and layout work for a locally-produced magazine during that period. CPBC Exh. 4. From February 1978 to July 1979, she was employed with West Point Pepperell as their corporate artist and regularly had two to three people working under her. Tr. 230.

13. Mrs. Cox has not had a paying job at a radio station, but does have some broadcast experience at her uncle's station, WZZZ. She has made commercials, gone on remotes and generally observed the processes that take place at an operating station. Her involvement at WZZZ lasted between nine months and a year. Tr. 236.

14. Mrs. Cox has lived in St. Simons Island for the same period as her husband, *i.e.*, since 1979. She is actively involved in the Christian Renewal Center in Brunswick, Georgia, the Ladies' Bible Study and the Daughters of the American Revolution. CPBC Exh. 4.

15. CPBC will equip its station with standby power generating equipment to enable it to remain on the air in case of a commercial power failure. CPBC Exh. 2, p. 2.

16. *James U. Steele.* Steele is a sole proprietorship and has no ownership interests in any broadcast facility or other mass communications media. Steele Exh. 1.

17. Steele will serve as full-time general manager of the station and will devote full time to supervising the station, its equipment and operation and he will have sole responsibility for making programming decisions on a day-to-day basis. Following grant of the construction permit, Steele intends to move to and reside in St. Simons Island. In the interim, Steele has kept up to date with the problems and needs of St. Simons Island by maintaining a subscription to the St. Simons Island weekly newspaper. Steele Exh. 1; Exh. 2, pp. 5–6; Tr. 251.

18. Steele grew up and attended college in the south, having lived in Meridian, Mississippi from 1953–1966. Tr. 252. He is a

college graduate, having attended Meridian Junior College and the University of Miami where he earned a bachelor of science degree after having majored in radio-TV-film and minored in marketing. Following graduation Steele matriculated at the University of Denver where he pursued post-graduate studies and earned a masters degree in mass communications. Steele Exh. 2, pp. 1–2.

19. Steele's twenty years history in the broadcast industry has spanned radio, television and trade association work, and he has held numerous management level positions. Steele's broadcast career began in 1962 when he was employed by WTOK-TV, Meridian, Mississippi, as studio cameraman, audio boom operator, set designer, floor crew manager and booth announcer. He worked for WTOK-TV until 1966 on a part-time basis while attending high school and junior college. From 1964 to 1966, Steele also worked on a part-time basis for radio station WOKK-AM as a weekend on-air personality and newscaster, commercial/public service writer and producer and salesman. During this period, Steele obtained a third-class radio telephone license with broadcast endorsement, and at station WOKK he performed limited engineering functions in accordance with that license. Steele Exh. 2, p. 1; Tr. 246–8.

20. While in graduate school, Steele worked on a part-time basis for station KBTV-TV, Denver, Colorado, as master control director. His responsibilities included supervision of master control operations, including duty director of all locally-originated programming and non-program material inserts into or between programs, program log entries and broadcast quality control reports. Steele Exh. 2, p. 2.

21. Following receipt of his masters degree from the University of Denver, Steele moved in February of 1971 to Indianapolis, Indiana, where he became director, traffic/operations, for WISH-TV. Among his responsibilities were preparation of the daily program logs, commercial/public service/promotion announcement scheduling, sales contracts and agency/client media buying instructions, commercial avails log and liaison with national advertising representatives. Steele Exh. 2, pp. 2–3.

22. In August 1971, Steele was offered and accepted the position of continuity supervisor for WBBM-TV, a CBS-owned and operated station in Chicago, Illinois. He was soon promoted to manager, television standards and practices. In that capacity, Steele was responsible for assuring station compliance with CBS corporate policies and practices, NAB television code, FCC rules, and regulations of other federal, state and local entities applicable to commercial broadcast programming and advertising. Steele helped prepare FCC annual reports and license renewal applications. He also supervised the continuity department staff, oversaw local and national advertising, as well as locally-produced and syndicated programming, in order to assure compliance with applicable pro-

gramming/advertising standards. Steele further served as management liaison with the CBS network legal and program/commercial clearance departments, maintained the station's local public file and coordinated music clearance rights with ASCAP and BMI, and prepared departmental budgets and payroll records. Steele Exh. 2, pp. 7–8.

23. In 1974 Steele became an editor of the Code Authority of the National Association of Broadcasters. He is currently in his eighth year with that organization. After a series of promotions, he now holds the position of Senior Supervisor, Childrens Advertising Review Unit. His responsibilities at the NAB have included supervisor of the childrens advertising unit's editorial staff; advisor to member stations and networks, advertising agencies, manufacturers and the general public regarding Code policies and guidelines; formulator with senior management of new or modified industry self-regulatory policies; and representative for NAB at industry-related functions. Steele Exh. 2, pp. 9–10.

24. In addition to holding a third-class radio telephone license with broadcast endorsement, Steele has successfully completed an FCC first-class license correspondence course offered by the Cleveland Institute of Electronics. Steele holds memberships in the International Radio and Television Society, New York Chapter of the National Academy of Television Arts and Sciences, Antique Wireless Association, Museum of Broadcasting, Texas Broadcast Museum, and WNET/Thirteen, Inc. Steele also holds an associate membership status in the Society of Broadcast Engineers. In addition, as an FAA certified private pilot, Steele is also a member of the Aircraft Owners and Pilots Association. Steele Exh. 2, pp. 4, 5.

25. Steele, throughout his career, has participated actively in the civic affairs of the communities in which he has lived. While in college in Meridian, his active support as a disc jockey of a local teenage activity center won him an "Outstanding Service" plaque for service to teenagers of Meridian from the Meridian Department of Parks and Recreation. In Indianapolis he was a volunteer motor pool driver for the Indianapolis Chapter of the American Red Cross. For the past five years in New York, Steele has been a play therapy volunteer in the Pediatrics Department/Ward of Lenox Hill Hospital. Steele intends to be active in civic affairs in St. Simons Island when he moves there after grant of his application. He proposes to devote a minimum of three hours per week to such civic involvement. Steele Exh. 2, pp. 1, 3, 5, 6.

26. As part of his equipment proposal, Steele plans to install auxiliary generator equipment to provide emergency backup to his main facilities. Steele Exh. 3.

27. *Dale Bell.* Bell, like Steele, is prosecuting her application as a sole proprietor or individual. Bell, a resident of St. Simons Island, Georgia since September 1979, will work at her proposed station as

general manager, devoting a minimum of forty hours per week to that position. Bell Exh. 1, p. 2. She currently holds interests in three cable systems within the state of Georgia. However, upon grant of her construction permit application, she will divest herself of all ownership and official relationships with those cable systems. Bell Exh. 1, p. 1. Aside from such ownership interests and/or official relationships, Bell does not own or hold such a relationship in any form, whether legal or beneficial, direct or indirect, at any radio station, television station, CATV system, newspaper, or any other medium of mass communications. Bell Exh. 1, p. 1.

28. As general manager of her proposed radio station, Bell would be in charge of day-to-day supervision of all staff activities and would exercise ultimate decision-making authority and responsibility for all station operations, including development of station policies, financial matters, hiring and firing, filing reports with the FCC, reviewing advertising contracts, and a determination of salaries and/or benefits paid to employees. Bell Exh. 1, p. 2.

29. Bell's broadcast experience is limited, but does include news gathering and announcing at WUFE, Baxley, Georgia, as well as assisting staff members there in advertising and production areas. Bell Exh. 1, p. 2; Tr. 275–8.

30. Bell proposes to acquire and utilize auxiliary power equipment at both her studios and transmitter sites so as to assure continued service in the public interest, including the safety of the public. Bell Exh. 1, p. 2.

C. *Coverage Comparison*

31. The applicants request a permit to construct a Class A FM broadcast station on Channel 224 operating with an effective radiated power (ERP) of 3.0 kW. Both CPBC and Steele propose to operate with an antenna whose height above average terrain (HAAT) is 300 feet. Bell proposes to operate with an antenna whose HAAT is 147 feet. Jt. Exh. 1, p. 1. St. Simons Island (population 6,818) is located in Glynn County (population 50,528) which is in the southeastern part of Georgia. There are no existing aural facilities licensed to St. Simons Island. Jt. Exh. 1, pp. 1–3.

32. There is some difference in the areas and populations proposed to be served by the three applicants. These areas and populations are tabulated below (Jt. Exh. 1, p. 1):

Applicant	*Primary Service*	
	Area (sq. mi.)	*Population*
CPBC	498	53,328
Steele	456	51,633
Bell	291	44,055

Applicant	*Primary Service*	
	Area (sq. mi.)	*Population*
CPBC's advantage over Steele	42 (9.2%)	1,695 (3.3%)
CPBC's advantage over Bell	207 (71%)	9,273 (21%)
Steele's advantage over Bell	165 (57%)	7,578 (17%)

33. There are at least five aural services available to each applicant's 1 mV/m service area full time. Jt. Exh. 1, p. 1. In establishing the number of aural services available to the 1 mV/m service areas of each of the applicants, the following stations were considered (Jt. Exh. 1, p. 1):

Location	*Call Sign*	*Facilities*
Jacksonville, Florida	WJAX	930 kHz, 5 kW, DA-N
Brunswick, Georgia	WGIG	1440 kHz, 5 kW-D, 1 kW-N
Brunswick, Georgia	WMOG	1490 kHz, 1 kW-D, .25 kW-N
Brunswick, Georgia	WPIQ	101.5 MHz, 100 kW, 245'
Brunswick, Georgia	WSBI	100.7 MHz, 6 kW, 170'

Conclusions of Law

34. This proceeding involves the mutually-exclusive applications of CPBC, Steele and Bell to construct a new FM station at St. Simons Island, Georgia. The issues to be resolved in this proceeding are the limited financial issue specified against CPBC and the standard comparative issue. Under the standard comparative issue, each of the qualified applicants must be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications. *Policy Statement*, 1 FCC 2d at 394.

A. *Limited Financial Issue*

35. The *Hearing Designation Order* noted that CPBC's cost of construction and operation of $64,363.36 would be met by $30,722 existing capital, $25,000 new capital and a bank loan of $9,102. Originally the $25,000 new capital was to be based on a stock subscription by Mrs. J. J. Baell, one of the applicant's principals. Mrs. J. J. Baell in turn depended upon a loan from her daughter, Miss Betty Baell, to purchase the $25,000 worth of stock. Since neither of these persons submitted a balance sheet to the Commission at the time the *Designation Order* was being issued, a financial issue was specified.

36. Subsequently Mrs. J. J. Baell died, and by amendment it was

reported that the $25,000 stock subscription would be made by Mr. and Mrs. J. Wesley Cox, the applicant's principal stockholders. It was also reported that J. Wesley Cox would borrow $25,000 from Miss Betty Baell to make the stock purchase. In committing herself to loan J. Wesley Cox the $25,000, Miss Baell conditioned it on the proceeds being used only to buy the above-mentioned stock subscription. Miss Baell submitted a balance sheet which, together with the testimony adduced at the hearing, indicates that she has enough liquid assets to make the loan in question. J. Wesley Cox also submitted a balance sheet. It is argued that the balance sheet indicates that Mr. and Mrs. Cox have $5,000 worth of current liabilities while owning only $150 in current assets and, therefore, do not possess sufficient "net liquid assets" to contribute the $25,000 to the corporation. However, in *Contemporary Television Broadcasting, Inc.*, BC Docket No. 80–768 (hearing Designation Order BC 05812, released January 16, 1981), the Broadcast Bureau announced that it will no longer require a financial statement in situations where a bank loan commitment letter to an investor has "earmarked" the loan funds specifically for the purpose of the investment. The reason underlying the ruling can be easily ascertained, that is, if the funds loaned are circumscribed for a sole specified use, the financial statement of the borrower is immaterial. It is ruled that the Bureau's change in policy is controlling herein and dispositive of the arguments made by Bell and Steele. It is not believed that the policy change is limited to situations where a "bank" makes the loan, since the thrust of the policy change is to eliminate the need for filing financial statements on the part of the person who is making the investment in an applicant.[5] Having made these findings, the conclusion can be made and is made that CPBC is financially qualified to be a Commission licensee.

37. CPBC, however, has also proposed to equip its station with standby power generating equipment to enable it to remain on the air in case of a commercial power failure. The estimated cost of this equipment is $6,000. The use of such equipment is not required by the Commission, but for CPBC to receive a comparative credit for its proposal, it has to demonstrate that it has sufficient funds to purchase the equipment. To that end, CPBC has proposed to borrow $10,000 from Mrs. Jerome C. (Dorothy) Cox. Mrs. Cox has designated the proceeds of a certificate of deposit in the amount of $10,092 for this purpose. CPBC also filed a statement of financial condition of Dr. and Mrs. Jerome C. Cox as of May 14, 1981. That statement shows a net worth for Dr. and Mrs. Jerome C. Cox in the amount of $220,067. Although certain adjustments were made in said statement because of testimony rendered at the hearing, the conclusion

[5] In the instant situation, it has been established that Miss Baell has sufficient funds to make the loan of $25,000.

reached is that the proceeds of the certificate of deposit designated for the CPBC loan of $10,000 are not needed by Dr. or Mrs. Cox to meet current liabilities and are, therefore, available to CPBC as a loan. In sum, CPBC has sufficient funds to construct and operate the proposed FM station for three months and to purchase standby power generating equipment.

B. *Comparative Analysis*

Diversification of Control of the Media of Mass Communications

38. Neither Steele nor Bell has present interests in the media of mass communications.[6] CPBC has an interest, by virtue of Anne Gallion's position as publisher and editor of a weekly newspaper serving Jekyll Island, a community located about one mile from St. Simons Island. Ms. Gallion holds only five shares, which represents less than 0.4% of the CPBC stock. She will have no active part in the operation of the CPBC station. St. Simons Island has its own weekly newspaper. There are five aural services to the coverage area of CPBC's station. It is concluded that CPBC's interest in the media of mass communications is very slight and CPBC receives only a very slight demerit for it.

Integration of Ownership and Management

39. Both Steele and Bell have timely proposed the equivalent of 100% integration of ownership and management. CPBC receives credit for 76.3% full-time integration owing to the full-time participation of J. Wesley Cox (38.15%) as general manager and Mrs. J. Wesley Cox (38.15%) as operations manager. CPBC also receives credit for the part-time (20 hours) integration of Mrs. J. J. Baell (21.7%) who had been proposed as sales manager. Mrs. Baell's status as sales manager is deemed to be a true management integration proposal and CPBC is entitled to the full promotional credit of 10.85%[7] for Mrs. Baell's proposed participation. In sum, CPBC receives credit for 87.15% full-time integration of its principals.

40. The qualitative attributes of CPBC's integrated owners enhance its proposal. Specifically, CPBC is enhanced because Mr. and Mrs. J. Wesley Cox are residents of St. Simons Island, have participated in the community's civic affairs and have previous

[6] Dale Bell is secretary/treasurer, director and 12% shareholder of Micro-Wave TV, Inc. in Jesup, Georgia; a 1;8 owner of Blackshear TV Cable, Inc. in Blackshear, Georgia; and a director and 1;8 owner of Cable Vue TV, Inc. in Baxley, Georgia. Prior to the cut-off date for amendments to her application, Bell advised the Commission that she would divest her interests in these CATV systems upon grant of her application for a construction permit.

[7] The figure of 10.85% is reached by multiplying Mrs. Baell's ownership interest of 21.7% by 50% (20 hours proposed participation).

broadcast experience. In addition, CPBC receives credit for female participation of 49% (38.15% + 10.85%).

41. Steele's proposal is qualitatively enhanced by virtue of his previous broadcast experience. Steele argues for substantial enhancement. However, the *Policy Statement* makes clear that previous broadcast experience, as an attribute of participating owners, is of only minor significance since emphasis upon this element could discourage qualified newcomers to broadcasting and since experience generally confers only an initial advantage. 1 FCC 2d at 396. *See also Webster-Baker Broadcasting Co.*, FCC 81R-109, para. 17, 50 RR 2d 1142 (Rev. Bd. 1982).

42. Steele also claims qualitative enhancement by virtue of his educational background which includes a masters degree in communications. This contention is rejected. Steele has not cited any case which sets forth educational standards applicable to potential broadcast positions. Indeed, broadcasters have come from all walks of life and from diverse educational and employment backgrounds. Furthermore, Steele may not be credited for any involvement in civic affairs since all of it was in communities too far removed from the community of license.

43. Bell's integration proposal is qualitatively enhanced by virtue of her past local residence within the proposed community of license and her status as a female.

C. *Coverage Comparison*

44. The record fails to establish that any of the applicants merit a significant comparative coverage preference. Although there are some differences in the proposed coverage, the service areas of the proposed applicants are already well served. *WVOC, Inc.*, 45 FCC 2d 420 (Rev. Bd. 1974). Five aural services already place a 1 mV/m or greater intensity coverage over each applicant's proposed coverage area (1 mV/m contours). None of the proposals would bring a first, second, third, fourth or even fifth service to any service area proposed, whether common or uncommon. Consequently, CPBC and Steele are awarded a very slight coverage preference over Bell.

D. *Auxiliary Power*

45. Each of the applicants has proposed to install auxiliary power generation. Bell, however, has proposed auxiliary power generating equipment for both studios and transmitter sites. Consequently, a very slight preference is awarded Bell for proposing to use auxiliary power at both studios and transmitter sites. *See Addendum To Policy Statement of July 28, 1965 on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

E. *Final Comparative Evaluation*

46. Steele and Bell are entitled to 100% quantitative integration

credit. CPBC is entitled to 87.15% full-time credit. The choice is, therefore, between Steele and Bell since it has been ruled that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981); *New Continental Broadcasting Co.*, 88 FCC 2d 830 (Rev. Bd. 1981).[8]

47. As between Steele and Bell, Bell's status as a female, coupled with her past local residence in the proposed community of license, overcomes Steele's past broadcast experience. Steele's slight preference for his coverage proposal is offset by Bell's slight preference due her proposal for auxiliary power generating equipment at both studios and transmitter sites.[9] It is, therefore, concluded that a grant of Bell's application will better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Dale Bell to construct a new FM broadcast station at St. Simons Island, Georgia (File No. BPH-801003AF) IS GRANTED and the applications of Cannon's Point Broadcasting Company (File No. BPH-800714AK) and James U. Steele (File No. BPH-800930AE) ARE DENIED.[10]

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK *Administrative Law Judge*

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[8] In *New Continental Broadcasting Co.*, the Review Board deemed a 12.5% quantitative difference between two proposals a "clear quantitative difference." 88 FCC 2d at 850.

[9] Even if Bell were not to receive a greater preference for auxiliary power than Steele, Steele's very slight preference for his coverage proposal, together with his broadcast experience, still would not overcome the qualitative enhancement awarded Bell's integration proposal.

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Comparative Hearing
FM Station, Authorization
Review by Review Board
Settlement

Review Board approved settlement agreement because it complied with 47 U.S.C. Sec. 311(c)(3) and granted FM broadcast application. Agreement was found to serve public interest and no party to it filed its application for purpose of reaching or carrying out such agreement.
– *Cedar Creek Radio Company*
BC Docket No. 82–46

FCC 83R-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
EDD LOWE ROUTT, NORMA LEE ROUTT, EDD L. ROUTT, JR. and KENDALL A. MINTER, d/b/a CEDAR CREEK RADIO COMPANY Malakoff, Texas	BC Docket No. 82–46 File No. BPH-800710AF
KENNETH R. JONES and GLENDA J. JONES d/b/a HENDERSON COUNTY RADIO Malakoff, Texas	BC Docket No. 82–47 File No. BPH-801003AA
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: March 14, 1983; Released: March 17, 1983.)

BY THE REVIEW BOARD:

1. On March 9, 1983 the two applicants in this proceeding filed a joint petition for approval of agreement which was supplemented on March 10, 1983. We will grant this petition because the applicants complied with the new settlement requirements of Section 311(c)(3) of the Communications Act, 96 Stat. 1087. *See Texas Television, Inc.*, 52 RR 2d 1268 (Rev. Bd. 1982), *review denied*, FCC 83–95, released March 9, 1983.

2. Section 311(c)(3) as amended now provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience, or necessity; and (b)

no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

In an Initial Decision, FCC 83D-10, released February 11, 1983, the Administrative Law Judge concluded that a grant of Cedar Creek's application would better serve the public interest. Instead of filing exceptions, the applicants have entered into an agreement which on approval would result in the dismissal of the competing application of Henderson County Radio and an immediate grant of Cedar Creek Radio Company's application. The Commission and Congress have recognized that settlement agreements such as the one in this case shorten lengthy and expensive proceedings, expedite initiation of new service, and generally serve the public interest. *See Texas Television, Inc., supra. See also Bison City Television 49 Limited Partnership*, FCC 83R-17, released March 16, 1983 (Rev. Bd.).

3. Section 311(c)(3)(b) requires a showing that "no party to the agreement filed its application for the purpose of reaching such agreement." The supplement filed March 10, 1983 showed that Henderson County Radio's application which is to be dismissed contained a certification that "The applicant represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict." It also pointed to extensive pre-trial investigations and extensive litigation and that the Henderson County Radio application was vigorously prosecuted throughout the comparative hearing. Thus, there is no appearance or assertion that Henderson's application was filed for the purpose of reaching or carrying out the settlement agreement. Since the parties have shown compliance with both Section 311(c)(3)(a) and (b), their joint request is hereby granted.

4. ACCORDINGLY, IT IS ORDERED, That, the Joint Petition for Approval of Agreement, filed March 9, and supplemented March 10, 1983 IS GRANTED; that the application of Henderson County Radio (BPH 801003AA) IS DISMISSED; that the application of Cedar Creek Radio Company (BPH 800710AF) IS GRANTED, and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO *Chairman, Review Board*

FCC 83D-10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
EDD LOWE ROUTT, NORMA LEE ROUTT, EDD L. ROUTT, JR., and KENDALL A. MINTER, d/b/a CEDAR CREEK RADIO COMPANY Malakoff, Texas	BC Docket No. 82–46 File No. BPH-800710AF
KENNETH R. JONES and GLENDA J. JONES d/b/a HENDERSON COUNTY RADIO Malakoff, Texas	BC Docket No. 82–47 File No. BPH-801003AA
For Construction Permit	

Appearances

Joseph E. Dunne, III on behalf of Cedar Creek Radio Company; *Harold K. McCombs, Jr.*on behalf of Henderson County Radio and *Arthur Steinberg* and *Brian Kilbane* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

(Issued: February 4, 1983; Released: February 11, 1983)

Preliminary Statement

1. This proceeding involves two mutually-exclusive applications for a new FM channel at Malakoff, Texas. The applicants are Cedar Creek Radio Company (Cedar Creek) and Henderson County Radio (Henderson County).

2. Since only one of the mutually-exclusive applications may be granted, the Commission by *Hearing Designation Order*, BC Mimeo No. 1930, 47 Fed. Reg. 5772 (released February 8, 1982), designated this matter for hearing on the following issues:

(1) To determine the site of Cedar Creek's transmitter and whether a proper engineering amendment is required.[1]

(2) To determine with respect to Henderson County:[1]

(a) the source and availability of additional funds over and above the $42,550 indicated; and

[1] The Presiding Officer granted Motions for Summary Decision deleting Issues 1 and 2 in Order, FCC 82M-1532 released May 13, 1982 (Issue 1) and Order, FCC 82M-2112 released July 9, 1982 (Issue 2).

(b) whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(3) To determine which of the proposals would, on a comparative basis, better serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. On March 10, 1982, Henderson County petitioned to enlarge issues against Cedar Creek. That petition was denied by *Order* (FCC 82M-1245) released April 19, 1982. Henderson County then filed two additional petitions to enlarge issues on August 10 and 16, 1982. These petitions were denied by *Memorandum Opinion and Order* (FCC 82M-3190) released October 15, 1982.

4. On June 7, 1982, Henderson County submitted a threshold showing concerning a claim of unusually good past broadcast record in the operation of KTLR-FM, Terrell, Texas and sought to introduce evidence in this proceeding. The request was denied in a *Memorandum Opinion and Order* (FCC 82-2148) released July 13, 1982.

5. A prehearing conference was held on April 15, 1982. The hearing was held on August 24, 1982 and the record was closed that date, but reopened and reclosed again on October 4, 1982 (FCC 82M-3082) released October 5, 1982.

6. Both applicants filed proposed findings of fact and conclusions of law on October 25, 1982 and each filed optional reply findings and conclusions on November 8, 1982.

Findings of Fact

The Applicants

7. Cedar Creek is a limited partnership established under the laws of the state of Texas and authorized to engage in the business of radio broadcasting. The general partners and their partnership interests are: Edd Lowe Routt, Sr. - 35%; Norma Lee Routt (his wife) - 35% and Edd Lowe Routt, Jr. (their son) - 25%. The only limited partner is Kendall A. Minter, who owns the remaining 5% partnership interest. To date, the only business in which Cedar Creek has engaged has been the February, 1980 filing and prosecution of the instant application for a construction permit to build and operate an FM station in Malakoff (Cedar Creek Exhibit 1, p. 1).

8. Kenneth R. Jones and Glenda J. Jones have applied for a construction permit for a new FM broadcast station at Malakoff, Texas, as individuals using the name Henderson County Radio. As husband and wife under Texas community property law they have an equal undivided one-half interest in the application (Henderson County Exhibit 1, p. 1; Tr. 79–80, 107–08).

Ownership of Media of Mass Communications

9. Kendall A. Minter, Cedar Creek's limited partner, is a 5%

shareholder, Vice-President and a Director of Commerce Broadcasting, Inc., licensee of KEMM, a Class A FM station licensed to Commerce-Greenville (Hunt County), Texas; the Secretary of Nash Communications Corp., the licensee of WILD-AM, Boston, Massachusetts; and the Assistant Secretary of P & L Broadcasting of Johnstown, Inc., licensee of WMYL-AM and WIZR-FM, Johnstown, New York. None of Cedar Creek's general partners possess an ownership interest in any other media of mass communications (Cedar Creek Exhibit 1, pp. 1–2).

10. Kenneth R. Jones, d/b/a Terrell Radio, applied for and obtained a construction permit and license for KTLR-FM at Terrell, Texas. Glenda J. Jones is the wife of Kenneth R. Jones and she has only such interest in KTLR-FM as may be pertinent under the Commission's multiple ownership rules. Mrs. Jones also has such interest in KTLR-FM as may be applicable under the Texas community property law and not in conflict with the rules and policies of this Commission (FCC 82M-3082, released October 5, 1982). The airline distance between the transmitting sites for Henderson County's proposed Malakoff station and KTLR-FM is 42 miles and the distance between the centers of Terrell and Malakoff is 42.5 miles (Henderson County Exhibit 3, p. 1). The 1 mV/m contour of KTLR-FM and Henderson County's proposed Malakoff station are separated by 12 miles (Henderson County Exhibit 2, p. 1).

Integration of Ownership and Management

Cedar Creek

Edd Lowe Routt, Sr.

11. If Cedar Creek is granted a construction permit to build the proposed station in Malakoff, Edd L. Routt, Sr., a general partner of Cedar Creek, will function as the station's General Manager, working a minimum of 40 hours per week. As General Manager, Mr. Routt will be responsible for: the overall operation of the station and its relationship to the communities served; the evaluation of station facilities and equipment; insuring Cedar Creek's compliance with FCC Rules and Regulations; the development of variations needed in individual and overall program formats; the development of rate structure on marketing; and the establishment and revision of office procedures at Cedar Creek. As the manager of a small market station, Mr. Routt will also be involved in the gathering, writing and broadcasting of some of Cedar Creek's local news, function as the station's chief editorialist and select guests and topics for proposed telephone talk shows (Cedar Creek Exhibit 2, pp. 5–6).

12. Mr. Routt's prior broadcast experience is quite extensive and includes work as a General Manager in radio stations ranging from Canada to Louisiana to Oregon. Mr. Routt is now functioning as a General Manager of an AM-FM combination radio station (a job he

can leave on two weeks notice), has some 12 years experience as General Manager of various radio stations, and some ten years additional experience in all aspects of radio broadcasting. Mr. Routt has also had experience in applying for and prosecuting an application for an FM station to grant by the Commission and actually building the station and commencing operation. He has, in addition, served for five years as a college instructor in broadcasting and has written several college textbooks on broadcasting and radio station operation (Cedar Creek Exhibit 2, pp. 2–5).

13. Mr. Routt resides at Rt. 2, Box 21 (Star Harbor), Malakoff, Texas although he has maintained an apartment in Salem, Oregon since January, 1981. Star Harbor is approximately three miles from downtown Malakoff or a five-minute drive from downtown Malakoff and within the 1 mV/m contour of Cedar Creek's proposed station. Mr. and Mrs. Routt have lived at that address since late April, 1980 (Cedar Creek Exhibit 2, p. 1; Tr. 42).

Norma Lee Routt

14. Mrs. Routt, a general partner of Cedar Creek, plans to work as Office Manager at the Malakoff station a minimum of 40 hours per week. As Office Manager, Mrs. Routt will set up the various forms the station needs to function, including the log forms, invoice/billing forms and will coordinate with the other general partners on setting up broadcasting orders and sales contracts. Mrs. Routt will also set up the regular commercial telephone system in the station; assist in the studio-office design; answer the telephones; prepare the daily logs; open and process the daily mail and will write copy and handle PSA material when necessary. Mrs. Routt will be responsible for supervising the announcers with respect to their logging; salespersons with respect to broadcast orders and sales contracts; be responsible to see that all timecards are filled in correctly and turned in on time; will oversee the group insurance plan; and will also compile the payroll as well as do the bookkeeping. In addition, Mrs. Routt will be in charge of station operation in the absence of the General manager, Mr. Routt (Cedar Creek Exhibit 3, p. 3).

15. Mrs. Routt's prior broadcast experience involves office management positions at two different radio stations (KRIM Radio, Rayville, Louisiana and KREB Radio, Monroe, Louisiana). At both KRIM and KREB, Mrs. Routt organized internal systems such as logs and billings; answered the phones; kept the books; handled the payroll and billing; and was in charge of station operation in the absence of her husband (Cedar Creek Exhibit 3, p. 1).

16. Mrs. Routt resides with her husband at Rt. 2, Box 21 (Star Harbor) Malakoff, Texas. See para 13, *supra*.

Edd Lowe Routt, Jr.

17. If Cedar Creek is successful in its bid for a construction permit to build a station in Malakoff, Edd Lowe Routt, Jr., a general partner of Cedar Creek, will assume the duties of Sales Manager, a minimum of 40 hours per week. In this capacity, he will be responsible for directing the marketing effort under the general supervision of the General Manager; will hire and supervise one full-time and several part-time persons; identify prospective advertisers and plan rate cards and promotional packages. Mr. Routt will also conduct regular sales meetings; instruct sales staff members on how to present the station product to prospective advertisers, write commercial copy and public service material and assist in the production of all such material. Mr. Routt may, on occasion, do an air shift and will gather, write and broadcast news material when appropriate. He will also provide input in the development of overall station policy including but not limited to editorials, news, sales and administrative policies and will be in charge of the overall operation in the absence of the General Manager and Office Manager (Cedar Creek Exhibit 4, pp. 3–4).

18. Mr. Routt has no real broadcast experience except his service as a disc jockey in several radio stations when he was a student (Cedar Creek Exhibit 4, p. 1).

19. Mr. Routt resides with his wife, Susan, at 144 Cedar Oaks Drive, Carolynn Estates, Mabank, Texas. This is within the "Cedar Creek" area, about eight miles from Malakoff and within the 1 mV/m contour of Cedar Creek's proposed station (Cedar Creek Exhibit 4, p. 1).

Kendall A. Minter

20. Kendall A. Minter is a 5% limited partner. Under the terms of the Cedar Creek limited partnership agreement, limited partners may not manage the business of the partnership and only general partners have the power to manage and operate the business of the partnership and determine its business policies therefore. Mr. Minter may provide occasional counsel when needed but will not participate in the management of the station (Cedar Creek Exhibit 1, p. 1; Tr. 40).

Henderson County

Kenneth R. Jones

21. In the event Henderson County's application is granted, Mr. Kenneth R. Jones will work at the station as General Manager and supervise overall station operations. As General Manager, Mr. Jones will devote a minimum of 30 hours and no less than three days per week to the Malakoff FM station. He will continue to serve as

General Manager of KTLR-FM to which he will devote 20 hours per week (Henderson County Exhibit 1, p. 1; Tr. 88).

22. Mr. Jones has extensive broadcast experience which includes work in several radio stations from 1959–1971 as part and full-time announcer, full-time General Manager and full-time Account Executive. From 1971–1979, Mr. Jones owned and managed ABC/Dal-land Advertising which was involved in broadcast advertising. In addition, Mr. Jones was responsible for constructing KTLR-FM, Terrell and has been active in the daily management and operation of the station since May, 1979 (Henderson County Exhibit 1, p. 2).

23. Mr. Jones resides with his wife, Glenda J. Jones, at Rockwall, Texas, outside the 1 mV/m contour of Henderson County's proposed station. Rockwall is approximately 60 miles from Malakoff by road and Mr. Jones estimates that the drive will take an hour during most of the year and longer during hazardous conditions in the winter (Henderson County Exhibit 1, p. 1; Tr. 80).

Glenda J. Jones

24. In the event the Jones' application is granted, Mrs. Jones will work at the station, supervising overall operation of the station in the absence of Mr. Jones. She will devote 20 hours per week to the Malakoff FM station. She will continue to serve as Station Manager of KTLR-FM, Terrell, Texas to which she will devote 30 hours per week (Henderson County Exhibit 1, p. 1).

25. Mrs. Jones has had some prior broadcast experience in that she has aided her husband in the construction, daily management and operation of KTLR-FM, Terrell since May, 1979 (Henderson County Exhibit 1, p. 2).

26. Mrs. Jones resides with her husband at Rockwall, Texas. See para. 23, *supra.*

Auxiliary Power

27. Cedar Creek will obtain an emergency generator to operate the station when regular power sources fail (Cedar Creek Exhibit 1, p. 2).

28. Henderson County will purchase and install an auxiliary power generator at the proposed station (Henderson County Exhibit 1, p. 3).

Comparative Coverage

29. Malakoff (population 2,082) is situated in Henderson County (population 42,606) and does not lie within any urbanized area, according to the 1980 U. S. Census. It is the third largest city in the county, behind Athens, the county seat (population 10,197) and Brownsboro (population 5,265). Malakoff presently has no AM or FM service licensed to it (Joint Engineering Exhibit, p. 1).

30. The predicted coverage contours of the Henderson County

and Cedar Creek propsals are not concentric. There is a common area both applicants propose to serve and two non-common crescent-shaped service areas formed by the intersection of the predicted 1 mV/m contours (Joint Engineering Exhibit, p. 9).

31. During the daytime, both non-common areas receive more than five aural services (Joint Engineering Exhibit, pp. 2 and 5).

32. There are four nighttime AM services and 13 FM services available within both the non-common areas (Joint Engineering Exhibit, pp. 2, 6, 7 and 9). These available nighttime aural services in the noncommon areas can be summarized by the following tabulation:

POPULATION AND AREA DATA

AVAILABLE NIGHTTIME AURAL SERVICES

	Cedar Creek		*Henderson*	
Non-Common Areas	*Pop.*	*Area (sq. mi.)*	*Pop.*	*Area (sq. mi.)*
No other service	0	0	0	0
One other service	0	0	0	0
Two other services	0	0	0	0
Three other services	225	18	75	3
Four other services	887	98	902	45
Five or more other services	1,839	19	5,894	76
Common Area	25,282	485	25,282	485
TOTAL	28,213	620	32,153	609

Cedar Creek Lake is located within the proposed service areas of the two applicants. The area of this lake was not included in the square mileage listed above (Joint Engineering Exhibit, p. 8).

Conclusions of Law

Diversity of Media of Mass Communications

1. The diversification factor is one of primary significance in the licensing scheme. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (hereinafter referred to as *Policy Statement*). In this proceeding, the principals of Henderson County, Mr. and Mrs. Jones, own 100% of a broadcast licensee whose transmitter site is only 42 miles from the proposed transmitter of the Malakoff station and where the proposed 1 mV/m or primary service contour of KTLR misses overlapping the primary service contour of the proposed Malakoff station by only 12 miles.[2]

[2] It is the Commission's policy to treat the mass media interest of a husband and wife in combination when applying the multiple ownership rules, absent a

2. On the other hand, none of the general partners of Cedar Creek have any ownership interest in any media of mass communications. The only media interests which may be attributed to Cedar Creek is the interest of Mr. Kendall A. Minter, Cedar Creek's 5% limited partner. Because Mr. Minter is merely a limited partner and because his media interests (see para. 9 *supra.*) are of little decisional significance when compared to the 100% ownership by the 100% owners of the applicant in a station so near the proposed station in Malakoff, significant comparative preference must be awarded to Cedar Creek.

Best Practicable Service

3. Though Cedar Creek has been awarded significant preference on the issue of diversification, this preference must now be considered along with other preferences accruing to each applicant under the criterion set out by the *Policy Statement.*

Integration of Ownership and Control

4. Cedar Creek is entitled to 100% quantitative credit for 100% integration of ownership and management by virtue of its proposal to integrate all of its general partners in significant managerial positions at its proposed station full-time, 40 hours per week. Because Mr. Minter, as a limited partner, can have no hand in the management of the applicant, his interest is of no significance here.[3]

5. Cedar Creek's integration proposal is qualitatively enhanced by virtue of the fact that all three Routts are residents of the proposed service area. However, the credit given to integrated principals who are local residents is lessened slightly because their local residence is neither of great duration nor do any of the Routts actually reside in the city of license, Malakoff, but nearby within the service area. *Policy Statement*, 1 FCC at 396, 5 RR 2d at 1910.

6. By contrast, Henderson County's proposed General Manager and 50% owner proposes to work 30 hours per week at the station, 3 days per week, in addition to his duties as General Manager of KTLR. Mrs. Jones proposes to work 20 hours or two days per week as Station Manager and devote 30 hours per week to her duties at KTLR-FM. Clearly the time commitments of the principals of

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showing that such consideration is inappropriate. . . . Since those rules and the diversification criteria applied in comparative broadcast proceedings are both facets of the same policy objectives to promote diversification of program and service viewpoints and to encourage competition among the media of mass communications, the principle is to be applied in the same manner for both proposals. *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2149, 44 RR 2d 127, 137 (Rev. Bd. 1978).

[3] See *Anax Broadcasting, Incorporated*, 87 FCC 2d 483, 488; 49 RR 2d 1589 (1981) where it was stated that "We do not consider the interest of limited partners relevant to determining integration credit".

Henderson County fall short of those commitments made by the principals of Cedar Creek.

7. Further, Henderson County can claim no qualitative enhancement by virtue of residence since neither principal is a resident of the Malakoff service area. See paras. 23 and 26, *supra*.

8. Though prior broadcast experience has also been a traditional area of comparison in the qualitative analysis, the Commission has repeatedly held it to be a factor of minor significance. See *Policy Statement*, 1 FCC 2d 396, n. 8, 5 RR 2d 1910, n. 8. Moreover, it is felt that no meaningful differentiation can be made by the applicants on this particular subject because of the extensive broadcast backgrounds of both Mr. Routt and Mr. Jones. Though Mrs. Jones' prior broadcast experience might merit slightly higher consideration than Mrs. Routt's, due to her work at Terrell, this would not bring Henderson County's integration credit even close to the level of credit that has been accorded Cedar Creek.

Comparative Coverage

9. The one preference to be awarded Henderson County among the general comparative factors, relates to comparative coverage. However, the weight to be accorded this preference must turn on the facts peculiar to the case.

10. Though Henderson County's proposal would serve 3,940 more persons than Cedar Creek, this particular population already receives service from five or more stations. And it has been held that greater area coverage enjoys less significance where the respective reception areas are well served. *Simon Geller*, 90 FCC 2d 250, 251, 51 RR 2d 1019, 1042 (1983). As a result, Henderson County will be awarded slight preference for its more substantial comparative coverage.

Auxiliary Power

11. Since both applicants propose auxiliary power, neither warrants a preference in this area of the comparative analysis.

Ultimate Conclusions

12. Based on a review of all of the comparative factors and the comparative preferences awarded to Cedar Creek and to Henderson County, it is concluded that on a comparative basis, Cedar Creek's application is superior to Henderson County's and that the public interest will be better served by a grant of Cedar Creek's application and a denial of the Henderson County application.

13. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Cedar Creek (File No. BPH-800710AF) IS

GRANTED and the application of Henderson County (File No. BPH-801003AA) IS DENIED.[4]

BYRON E. HARRISON
Administrative Law Judge

[4] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Domestic Public Land Mobile Radio Service
Mobile Radio Service, Cellular
Rules, Amendment of

Memorandum Opinion and Order adopted extending filing date for accepting cellular applications for all other markets to December 1, 1983 and revises procedural rules for licensing and operation of cellular communications systems. Part 22 of rules amended to change dates for filing direct and rebuttal cases and clarify the amended rules. Petitions for reconsideration requesting revision of procedural rules denied.
–*Cellular Communications Systems*

FCC-83–124

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ADVANCED MOBILE PHONE SERVICE, INC.	File No. 26030-CL-P-82
CONTEL MOBILCOM, INC.	File No. 26038-CL-P-82
GTE Mobilnet of Los Angeles, Incorporated	File No. 26053-CL-P-82
For a construction permit to establish a cellular system to operate on frequency block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Los Angeles-Long Beach, California, modified Standard Metropolitan Statistical Area	

MEMORANDUM OPINION AND ORDER GRANTING APPLICATION

(Adopted March 31, 1983; Released April 26, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (1) the

captioned applications of Advanced Mobile Phone Service, Inc. (AMPS),[1] GTE Mobilnet of Los Angeles Incorporated (GTE Mobilnet),[2] and ConTel Mobilcom, Inc. (ConTel),[3] each requesting authorization to construct a cellular mobile telephone system in the Los Angeles, California, Modified Standard Metropolitan Statistical Area; (2) a Limited Partnership Agreement for the Provision of Cellular Mobile Communications in the Los Angeles, California, Modified Standard Metropolitan Statistical Area and a Joint Request for Approval of Limited Partnership Agreement filed by AMPS, GTE Mobilnet, ConTel and United States Cellular Corporation (USCC);[4] and (3) various comments and pleadings relating to the applications and referenced agreement.

2. The applications from AMPS, GTE Mobilnet and ConTel are electrically mutually exclusive and, thus, cannot all be granted. In the ordinary course of events, these applications would be designated for comparative hearing to determine which application would best serve the public interest.[5] However, after filing their applications, AMPS, GTE Mobilnet, and ConTel formed a limited partnership jointly to provide cellular mobile telephone service in the Los Angeles market. As explained below, USCC has a 5% limited share of the partnership. The applicants have requested that the Commission approve their limited partnership agreement, dismiss conditionally and without prejudice GTE Mobilnet's and ConTel's applications, permit AMPS to amend its application to substitute the limited partnership as the applicant, and grant AMPS' application, as amended.

3. Comments regarding the agreement were filed by the Department of Justice, ICS/MCI, a partnership of ICS Communications and MCI Communications, and Telocator, the national council of independent nonwireline common carriers. These commenters all question whether the agreement may have anticompetitive consequences. The Department of Justice, for instance, maintains that the agreement may violate the antitrust laws unless the Commission can reconcile its reliance on the comparative hearing process to select among mutually exclusive applicants and its statements encouraging such applicants to reach settlement agreements to avoid such hearings. ICS/MCI maintains that the agreement may be anticompetitive since it includes, among other things, provisions restricting

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[1] AMPS is a wholly-owned subsidiary of American Telephone and Telegraph Company (AT&T).

[2] GTE Mobilnet of Los Angeles is a wholly-owned subsidiary of General Telephone and Electronics Corporation (GTE).

[3] ConTel Mobilcom, Inc. is a wholly-owned subsidiary of Continental Telephone Company.

[4] United States Cellular Corporation is a wholly-owned subsidiary of Telephone and Data Systems, Inc. (TDS), a wireline telephone company.

[5] *See* Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(e).

the rights of the limited partners to assign and sell their interests to others; and Telocator questions the provisions in the agreement which restrain against alienation of the limited partners' investment interests to nonwireline entities.

4. ICS/MCI also maintains that the amended application should be designated for hearing because of AMPS' alleged extensive anti-competitive conduct through AT&T's subsidiary, Pacific Telephone and Telegraph Company; because the capitalization plan evidences that AMPS has unlawfully subsidized its proposed cellular service; because AMPS has not demonstrated that it is a financially qualified applicant in the Los Angeles market; and because AMPS' interconnection proposals are inadequate. Finally, ICS/MCI maintains that the agreement violates the Commission's rules since one of the limited partners (USCC) is not an eligible wireline carrier in the Los Angeles market.

5. The objections expressed by the Department of Justice, ICS/MCI and Telocator are discussed below. Briefly, however, we find that the petitioners have failed to raise any substantial and material question of fact warranting exploration in an evidentiary hearing or requiring rejection of the limited partnership agreement. Rather, we find that the public interest will be served by approval of the agreement and grant of AMPS' application as amended.

Background

6. In January, 1980, the Commission announced its intention to develop policies, standards and procedures for the establishment and licensing of cellular mobile telephone systems in the 825–845 and 870–890 MHz frequency bands.[6] Following the receipt and evaluation of comments, the Commission, in May 1981, decided to license two cellular systems per service area by allocating one 20 MHz frequency block to wireline carriers and one to nonwireline carriers.[7]

7. Eligibility for the 20 MHz wireline allocation was limited to those telephone companies already providing wireline telephone service in a particular market.[8] The Commission reasoned that, in this way relatively few electrically mutually exclusive applications would be filed for the wireline allocation, thus promoting rapid institution of the service to the public. In those instances where there could be more than one eligible wireline applicant, the Commission encouraged settlement, stating:

> Where more than one wireline carrier is certified in a Standard Metropolitan Statistical Area (SMSA), and those carriers desire to provide cellular service, we

[6] Cellular Communications Systems, 78 FCC 2d 984 (1980).

[7] Cellular Communications Systems, 86 FCC 2d 469 (1981), *reconsideration*, 89 FCC 2d 58 (1982), *further reconsideration*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82–1526 (D.C. Cir. March 3, 1983).

[8] *Id.*, 86 FCC 2d at 482, 487–93; 89 FCC 2d at 61, 69–74.

strongly urge them to reach mutually acceptable arrangements in order to avoid electrically mutually exclusive applications which require comparative hearings. For example, they might agree upon joint operation of one large system or coordinated operations of adjacent systems which cover the entire metropolitan area.[9]

8. The Commission provided that cellular applications for both the wireline and nonwireline allocations in the largest 30 markets were to be filed on June 7, 1982. On that date, AMPS filed cellular applications in twenty-nine of the top-30 markets, GTE Mobilnet filed cellular applications in fifteen of the top-30 markets, and ConTel filed cellular applications in four of the top-30 markets. On the following day, June 8, 1982, the Commission was advised that AMPS and nineteen other wireline companies had reached agreements in principle designed to avoid their electrically mutually exclusive applications in 18 of the top-30 markets, including the Los Angeles market.[10]

9. Pursuant to the terms of these letter agreements, AMPS would have a majority ownership interest in and would operate cellular systems in fifteen markets,[11] GTE Mobilnet would have a majority ownership interest and would operate cellular systems in six markets,[12] and various other independent wireline telephone companies would have a minority ownership interest in some of these systems. While AMPS and GTE would continue to prosecute their cellular applications in certain markets where only one of them is the applicant[13] in consideration of the accord, AMPS, GTE Mobilnet and the other wireline carriers participating agreed not to

[9] *Id.*, 86 FCC 2d at 490–91, 89 FCC 2d at 76. The Commission has also strongly encouraged nonwireline applicants to reach settlements. 86 FCC 2d at 490–91.

[10] These letter agreements were expressly contingent upon and subject to: a continuation of the Commission's *Cellular* decisions, *supra*, note 7, relating to the cellular wireline allocation; the issuance of licenses to GTE and AT&T or their cellular subsidiaries authorizing them to construct and provide cellular radio service in the identified SMSAs; and any requisite state or other regulatory approvals.

[11] New York, NY/Nassau-Suffolk, NY/Newark, Jersey City and Paterson-Clifton-Passaic, NJ; Los Angeles-Long Beach/Anaheim-Santa Ana Garden Grove/Riverside-San Bernardino-Ontario, CA; Chicago, IL; Detroit/Ann Arbor, MI; Washington, DC-MD-VA; Dallas-Fort Worth, TX; St. Louis, MO-IL; Pittsburgh, PA; Minneapolis-St. Paul, MN-WI; Atlanta, GA; San Diego, CA; Seattle-Everett, WA; Milwaukee, WI; Cincinnati-OH-KY-IN; and Kansas City, MO-KS. Various independent telephone companies will have minority ownership interests in some of these systems. Cincinnati Bell Inc. will have a minority ownership interest in the cellular system for the Cinncinnati-OH-KY-IN SMSA.

[12] Cleveland, OH; Houston, TX; Indianapolis, IN; Portland, OR-WA; San Francisco-Oakland, CA; and San Jose, CA. AMPS and various independent telephone companies will have minority ownership interests in these systems.

[13] AMPS would continue to pursue its applications to provide cellular service in: Phoenix, AZ; Philadelphia, PA; New Orleans, LA; Miami/Fort Lauderdale-Hollywood, FL; Denver-Boulder, CO; Buffalo, NY; Boston-Lowell-Brockton-Lawrence-Haverhill, MA-NH; and Baltimore, MD. General Telephone & Electronics Corporation or its cellular subsidiary(s) would continue to pursue its application

pursue their mutually exclusive applications in those markets subject to the letter agreements. To this end, however, the parties noted that their letter agreements were subject to the execution of more definitive contracts among them in each specific market.

10. Beginning on October 26, 1982, the parties executed specific agreements for each of the various cellular markets where they had reached an accord. These agreements were duly filed with the Commission. The full terms of these agreements will not be set forth in detail here. While the details of the agreements vary from market-to-market, the essential provisions are substantially identical. Either AMPS or GTE Mobilnet is both a General and Limited Partner with majority ownership interest in a particular market, and either AMPS, GTE Mobilnet or one or more of the other wireline carriers is a Limited Partner in those markets. For instance, pursuant to the terms of the Los Angeles agreement, AMPS will have a 40 percent interest as a General Partner and a 25 percent interest as a Limited Partner. GTE Mobilnet, ConTel and USCC, on the other hand, will have a 20 percent, 10 percent, and 5 percent interest, respectively, as Limited Partners.

11. The agreements also provide that the parties will share in income and expenses in proportion to their ownership interest. However, for the most part, the responsibilities of the Limited Partners are confined to meeting their cash investment obligations, whereas the General Partner is responsible for the operation, expansion and funding decisions, and must seek all necessary regulatory approvals. The General Partner is also responsible for obtaining interconnection with the landline network. The agreements also provide that, while a Limited Partner may transfer its interest to an affiliate without restriction, otherwise there can be " . . . no sale, exchange, or other transfer or assignment of the whole or any part of any Limited Partner's interest without the prior written consent of the General Partner . . .;" that "[n]o such sale or exchange or other transfer or assignment shall . . . be made to a non-wireline carrier;" and that, "[i]n addition, before any Limited Partner sells any part of its . . . interest to a non-affiliate . . ., it shall offer, by giving written notice to the General Partner, that interest to all other Partners . . .."

12. On November 2, 1982, AMPS, GTE Mobilnet, Contel and USCC[14] filed a Joint Request seeking approval of their Limited

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to provide cellular service in the Tampa-St. Petersburg, FL SMSA. We have already granted AMPS' applications in Chicago, Boston, Pittsburgh, Buffalo, Philadelphia, Phoenix and New York.

[14] USCC's participation in this settlement apparently is part of an overall web of settlements among cellular applicants. TDS, through its subsidiary, USCC, is a wireline applicant for the Indianapolis, Indiana, wireline cellular system. TDS, in a Joint Motion submitted to the Commission in regard to its Indianapolis application, requests dismissal of that application contingent on and subject to approval by the Commission of the Los Angeles Limited Partnership Agreement.

Partnership Agreement for the provision of cellular mobile telephone service in the Los Angeles, California, Modified SMSA. In support therefore, the parties note that " . . . the instant request relies not only upon . . . Commission encouragement of cooperation by wireline carriers but also upon the agency's well-established policies for settlement of conflicts between electrically mutually exclusive applications," citing Section 22.29 of the Commission's rules.[15] To this end, the parties submit that " . . . grant of . . . [the Joint Request] and subsequent implementation of the Limited Partnership Agreement will serve the public interest in that it will eliminate the need for a costly and time-consuming comparative proceeding, thereby conserving the time and funds of the Commission and of the parties and permitting the early initiation of cellular mobile communications service in the Los Angeles Modified SMSA." Accordingly, the parties request that their Los Angeles Limited Partnership Agreement be approved, that the applications of GTE Mobilnet and ConTel be conditionally dismissed without prejudice, that AMPS be permitted to amend its application in accordance with the terms of the agreement, and that the AMPS' application, as amended, be granted.

Department of Justice Petition

13. The Department of Justice maintains that unless the Commission can reconcile its reliance on the comparative hearing process to select among mutually exclusive applicants and its statements encouraging settlements to avoid such hearings, the agency could subject the agreement participants herein to liability under the antitrust laws. This is so, asserts the Department, because the Commission has failed to state explicitly that "the public interest is served better by such an agreement than by a decision among competitive applications." The Department notes, in this regard, that while the Commission's cellular orders encourage competitive applications, on the one hand, and settlements to avoid comparative hearings, on the other, by failing to place its language encouraging settlements in its ordering clauses" the Commission created . . . ambiguity for anyone attempting to ascertain its legal effect." Thus, asserts the Department, the "applicants must choose either to frustrate the Commission's apparent eagerness to eliminate comparative hearings and risk subsequent denials of their individual license applications, or follow what they believe to be the Commission's urgings—although issued without explicit Commission mandate—and possibly violate the anti-trust laws." The Department therefore

[15] Section 22.29(a)(2)(ii) of the Commission's rules, 47 C.F.R. § 2.29(a)(2)(ii), requires a formal filing in all cases involving "[a] proposed withdrawal, amendment or dismissal of any application(s), petition(s), pleading(s), or any combination thereof, which would thereby permit the grant without hearing of an application previously in contested status."

concludes that the Commission must "consider the impact of the conduct it has invited;" and, "[i]f comparative hearings are not to be used, the Commission should eliminate that procedure, and state expressly why private agreements are the best way to satisfy the public interest, convenience and necessity."

14. AMPS, in reply, initially notes that the Department does not address the parties' Limited Partnership Agreements, the Joint Requests, or the parties' cellular applications. Rather, AMPS asserts, the Department untimely seeks to have the Commission revisit the policies and procedures [it] clearly enunciated in the *Cellular Radio* decisions relating to the use of comparative procedures to select between applicants, on the one hand, and its statements encouraging settlements, on the other. Moreover, argues AMPS, the Commission throughout its cellular decisions "has been explicit in strongly urging both wireline and non-wireline applicants to reach mutually acceptable arrangements for the provision of cellular service." AMPS maintains, in this regard, that "it would be both incongruous and impractical for the Commission, having just set out a detailed opinion, to restate its entire opinion in the ordering clause" of its cellular decisions to assure that cellular applicants more clearly understand its policies and procedure, including those relating to settlements.

15. AMPS further asserts that the "Department is simply incorrect" in maintaining that "the Commission's encouragement of settlements while also streamlining its comparative hearing process suggests inconsistent and contradictory methods of handling competing applications." In view of the Commission's goal of making cellular service available to the public as rapidly as possible, AMPS notes that "both settlements and expedited hearings serve the same ends." In this respect, AMPS argues:

> Settlements avoid the delay inherent in the most streamlined of hearings: to the extent comparative hearings can be avoided, the public interest will be served in the rapid deployment of service. Where comparative hearings are unavoidable, a streamlined hearing also serves the public interest by choosing among competing applicants as quickly as feasible.

16. The Commission, of course, must consider the antitrust implications of its actions when developing new policies and procedures. *National Broadcasting Co. v. United States*, 319 U.S. 190, 222–224 (1943). Competitive concerns, however, may be balanced against other public interest benefits, *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94–95 (1953), and the Commission may find that these benefits warrant approval of a policy even if it is assumed to have some antitrust consequences. *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980).

17. We recognize that there may be some antitrust value that could accrue by preserving competition at the application stage for a

cellular license. Here, however, other public interest benefits far outweigh any perceived benefit this undefined value may have.[16]

18. In our *Cellular* decisions, we found that there is a pressing need for new mobile telephone service and that such service could result in increased productivity, energy savings, and economic efficiency.[17] We sought therefore to reduce the regulatory delay inherent in the comparative hearing process.[18] However, we also recognized that even streamlined comparative hearing procedures would result in significant administrative delay.[19] Thus, we strongly urged wireline and non-wireline mutually exclusive applicants to reach settlements to provide this much needed communication service to the public more expeditiously.[20] Such agreements are pivotal to the rapid implementation of cellular service. Indeed, settlement agreements may be the most viable method of providing the public with expeditious cellular service. The Commission thus far has received 543 acceptable applications in the top 60 markets—122 for the wireline allocations, 421 for the nonwireline allocations, and 567 more applications for markets 61–90. We have also received over 700 pleadings relating to those applications filed in the top 50 markets and many more pleadings will be filed when all the applications have been placed on public notice.[21] The longer the use of cellular spectrum is delayed, the greater the loss to the public will be in terms of productivity, energy savings, and economic efficiency. To this end, our agreement policy is equally strong for both wireline and non-wireline applicants. We will make no grant to any applicant who is not fully qualified to establish a high-quality cellular system. The slight benefit we might realize through comparative proceedings

[16] As previously noted, our Cellular decisions provide for actual competition in each market between two competing systems, one operated by a wireline carrier and the other by a non-wireline carrier. The actual competition between these two competing systems in each market provides a far more significant competitive stimulant than that which may flow from having each class of cellular applicants compete for their respective licenses at the application stage. *See, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651, 660 (1964), which demonstrates the advantageous role competition from only one competitor can play as a complementary force in a regulated industry.

[17] 86 FCC 2d at 490–91.

[18] *Id.*, 86 FCC 2d at 490.

[19] The Department in its comments suggests that the use of a lottery may be the best means of reducing regulatory delay. The Commission considered the use of lotteries in cellular proceedings and decided not to use this alternative at that time. Second Notice of Proposed Rulemaking, Gen. Doc. No. 81–768, 47 Fed. Reg. 45046, 45047 (October 13, 1982).

[20] 86 FCC 2d at 490, 491.

[21] Absent agreements on both the wireline and non-wireline allocation side, it will take a great deal of time to process these applications even with the streamlined comparative hearing process. As of the date of this order, applications in 13 markets have been designated for hearing and applications in 9 markets have been granted due to settlement agreements or due to the fact that there was no competing application.

in identifying marginally better qualified candidates than those obtainable through settlements, is significantly outweighed by the loss of service time that the public will suffer under the hearing procedures necessary to make that identification.

19. We cannot, of course, direct mutually exclusive applicants to enter into agreements to avoid the comparative evaluation to which they are entitled under Section 309(e) of the Communications Act and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The public interest will be better served, however, if applicants settle their differences. We therefore again strongly encourage settlements whenever possible. Assuming agreements to be otherwise consistent with our policies and law, we will approve them as being in the public interest. Thus, we find no conflict between our statements in the cellular decisions calling for settlements and the need to establish reasonable comparative criteria and expedited processing procedures when settlement is not possible. We therefore reject the Department of Justice's Petition to the extent that it argues that such a conflict exists and we find that settlements agreements are in accord with the public interest, convenience and necessity standard of the Communications Act.

USCC Eligibility

20. ICS/MCI asserts that since USCC and its parent, TDS, are not eligible wireline carriers in the Los Angeles market within the meaning of Section 22.902(b) of the Commission's rules, "the Commission should bar it from the outset from obtaining an ownership interest in the Los Angeles wireline system." This is particularly so, asserts ICS/MCI, because USCC, pursuant to the right of first refusal provision in the Agreement, could acquire up to a 60 percent interest in the system over a period of time.

21. In conjunction with the foregoing, ICS/MCI also argues that "any approval of USCC's involvement in the licenses . . . would be highly inequitable." ICS/MCI notes that USCC unlike non-wireline applicants has "not expended great amounts of time and money preparing and prosecuting" its own application. Nonetheless, asserts ICS/MCI, USCC has positioned itself to earn a share of the profits of potentially the most lucrative cellular franchise in the country solely by reason of its ability to strike a "sweetheart" deal with AMPS and other wireline applicants. This, maintains ICS/MCI, is inequitable because the non-wireline applicants for the Los Angeles market have "no assurances that they will become participants and share in the profits of any cellular franchise awarded in the market."

22. The applicants all maintain that ICS/MCI's allegations relating to USCC's participation as a limited partner should be denied. They contend that Section 22.902(b) of the Commission's rules does not restrict an ineligible wireline carrier or anyone else from having a mere investment interest in a wireline system without

any control whatsoever. AMPS also notes that each non-wireline applicant in the Los Angeles market could share in their separate allocation in the system "if they followed the Commission's strong encouragement to settle their differences and form partnerships as the wireline carriers have done."

23. When the Commission adopted the eligibility requirement, we stated that a wireline applicant is "eligible to apply only in those general areas in which it or an affiliate company is certified as a wireline carrier." *Cellular Communications Systems*, 86 FCC 2d 469, 490 (1981), at n. 56. In the past, we have permitted wireline companies to apply for wireline frequencies in any market without regard to where they were doing business as a wireline, under *Bonduel Telephone Co. (Bonduel).*[22] However, we determined that in order to achieve our objective of rapid implementation of cellular service, we would not apply the *Bonduel* rule to cellular carriers during the separate allocation period. *Id.*

24. The eligibility requirement expressly pertains to application eligibility, not to ownership participation. In a March 24, 1982 Public Notice, *Cellular Application Filing Procedures*, Mimeo 2973, the Common Carrier Bureau stated correctly that the Commission had not determined the level of minority investment ownership which would affect eligibility for purposes of the separate frequency blocks. It stated further that such questions would be determined on a case-by-case basis.

25. As a general matter, we find that it is permissible for ineligible carriers to have a minority ownership interest in an eligible cellular applicant during the two year set-aside period. Therefore, both ineligible wireline carriers and non-wireline carriers could have minority ownership interests in a wireline company, and vice versa. However, the ownership interest must be minor and control of the company must remain vested in the eligible carrier during the two year set-aside period. This decision is consistent with the objectives of the eligibility requirement: avoiding lengthy comparative hearings and speeding implementation of service. Minority wireline/non-wireline participation will not cause additional applications or delay beyond the Commission's general review of the limited partnership agreement.

26. Accordingly, we find that inclusion of USCC as a 5% limited partner in the Los Angeles wireline, without any operational control, is permissible. Petitioner's concern that USCC could acquire up to a sixty percent interest in the system, pursuant to a right of first refusal, is unfounded. Each partner is initially entitled to purchase only its proportionate share of the offering partner's interest. Therefore, so long as USCC does not acquire a majority of the limited

[22] 68 FCC 2d 497 (1978).

partner shares during the two year set-aside period, its participation in the wireline system is consistent with our rules and policies.

Sale of Partnership Interest

27. Both ICS/MCI and Telocator assert that the Agreement improperly restricts sale of a limited partner's interest to non-wireline carriers, and impermissibly extends the period of the wireline set aside.[23] In reply, GTE Mobilnet notes that "[t]he Commission has not yet determined whether or to what extent a non-wireline company may invest in a wireline cellular system." In light of this uncertainty, argues GTE Mobilnet, "the agreement takes the conservative approach and restricts sale of a limited partner's interest to non-wirelines." GTE Mobilnet also states, however, that it is not the company's "intention to exclude non-wirelines from future partnership consideration for reasons other than regulatory eligibility;" and, accordingly, "[a]t the end of the two-year set aside period, GTE would not oppose eliminating this restriction."

28. AMPS also maintains that the agreement does not constitute an invalid restraint on alienation of a partner's interests or an invalid attempt to extend the duration of the wireline set-aside. AMPS argues, in this regard, that "the power to assign may be restricted in . . . [a] partnership agreement" if it is a reasonable restraint. Also, while recognizing that "[t]he Commission's set aside . . . controls the *application process* for the initial two-year period," AMPS argues that the agreement does not extend this period since "[a]t the end of that period any entity, wireline or non-wireline, has a right to challenge renewal and seek the license for itself." AMPS concludes therefore that the provision in the Agreement relating to the ability of the partners to assign their interests is a "valid contractual provision . . . and should be sustained."

29. We conclude that the restriction against alienation to non-wireline carriers, contained in Section 11.1 of the partnership agreement, contravenes Commission rules and policies and is contrary to the public interest. In our cellular decisions, we adopted a separate allocation for wireline and non-wireline carriers based upon a determination that it would minimize the delay inherent in comparative hearings. Our objective was to expedite cellular radio service to the public. However, we limited the duration of the separate allocation to two years in an effort to minimize any potentially anticompetitive effects stemming from the set-aside. *Reconsideration*, *supra* at pp. 72 and 73.

30. We agree with petitioners that the indefinite prohibition

[23] ICS/MCI also maintains in this regard that this prohibition constitutes an invalid restraint on alienation under the Uniform Limited Partnership Act as enacted in California. Since we find here that the public interest requires deletion of this provision, the ICS/MCI argument is moot.

against transfer or assignment of a partner's interest to a non-wireline carrier impermissibly extends the two year set-aside. The wireline carriers cannot unilaterally extend the duration of an exclusive wireline franchise in violation of Commission rules and policies. Moreover, we have determined that it is permissible for ineligible carriers to acquire minority ownership interests in eligible applicants during the two-year set aside. *See* para. 24, *supra.* Accordingly, the agreement must be amended to eliminate the following language contained in Section 11.1: "no such sale or exchange or other transfer or assignment shall, however, be made to a non-wireline carrier."[24]

Anticompetitive Conduct

31. ICS/MCI next maintains that AMPS' application should be denied because of anticompetitive conduct by another AT&T subsidiary, Pacific Telephone and Telegraph Company (PT&T). ICS/MCI argues in this regard, that there is factual evidence pending before the Commission which clearly shows that PT&T "has engaged in anti-competitive, noncompensatory, predatory pricing in connection with its rendition of mobile telephone service." Thus, asserts ICS/MCI, "before AMPS is permitted to begin construction and operation of an expensive new communication system which is destined for early transfer to the . . . [Bell Operating Companies], the FCC must conduct a thorough investigation of PT&T to ensure that it possesses the requisite qualifications to be a licensee."

32. AMPS, in response, asserts that "ICS/MCI disregards the fundamental fact that PT&T is not the applicant in this proceeding, nor is it contemplated that PT&T will be the licensee or the parent corporation of the licensee." Thus, argues AMPS, "ICS/MCI's spurious and desparate proposal . . . should . . . be dismissed" since "PT&T's character [would] be relevant only if it would seek to become a cellular license holder in its own name."

33. We reject the allegation that AMPS' application should be denied or deferred consideration due to pending allegations that Pacific Telephone & Telegraph Company has engaged in anticompetitive conduct. First, PT&T is not the cellular applicant nor will it be the licensee or parent corporation of the licensee in the future. Upon our approval of AT&T's capitalization plan, filed May 25, 1982, AMPS will be merged into AT&T Cellular Co. another wholly-owned subsidiary of AT&T. AT&T Cellular Co. will continue to be the applicant or permittee for all cellular projects until January 1, 1984.

[24] We will therefore, as explained in para. 45, *infra.*, conditionally grant the requested authorizations. We note that due to the case-by-case and evolving nature of our ownership policy as discussed in paras. 24–26, *supra*, we would have no objection to a provision in the partnership agreement which would make sale or transfer of a minority ownership interest subject to any necessary regulatory policies or approvals.

At that time, with the Commission's approval, AT&T will establish seven regional cellular companies, each a wholly-owned subsidiary of one of the seven regional holding companies created in compliance with the Modification of Final Judgment.[25] Thus, in the Far West Region, the cellular company will be an affiliate of PT&T in that both the cellular company and PT&T will have common control at the holding company level. However, PT&T and the cellular company will not have common officers or common facilities and services. See Section 22.901(c). Because of this degree of separation, and because ICS/MCI has failed to give any reason why the conduct attributed to PT&T should be imputed to AMPS or any other parent or affiliate of PT&T, we will not attribute the conduct of PT&T to the cellular licensee.

34. Second, ICS/MCI's allegations about PT&T have yet to be proven in any agency or court having jurisdiction over PT&T. AMPS points out in its Reply Comments, at p. 15, that the California Public Utilities Commission has found no proof of the conduct complained of by ICS/MCI. Consequently, there is no reason to deny or condition any AMPS authorization because of alleged, unproven conduct by PT&T.

Capitalization Plan

35. ICS/MCI further maintains that AT&T's Capitalization Plan evidences that it has unlawfully subsidized its cellular activities. ICS/MCI argues, for instance, that AT&T's financial arrangements with the Bell Operating Companies "is a pure form of cross-subsidy since the monies advanced by the BOCs to AT&T's cellular activities in essence constitute an interest free loan which would be repaid in inflated (i.e., less valuable) dollars." AMPS, in reply, maintains that "ICS/MCI's comments on AT&T's Capitalization Plan for its cellular subsidiary are untimely,[26] groundless, and irrelevant to the instant proceeding." AMPS argues that ICS/MCI has mischaracterized the BOC expenses as "advances" when, in fact, such payments compensated AT&T for business functions performed for the BOCS on a centralized basis and so that they would be in a position to provide any data the Commission might request. AMPS then argues that the issue is moot. This is so, according to AMPS, because all resources now owned by AMPS will be placed in seven separate corporations that will be owned by seven regional companies upon AT&T's divestiture of all ownership interests in the Bell Operating Companies.

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[25] U.S. v. American Telephone and Telegraph Co., Civ. Nos. 74–1698 and 82–0192, ___F.Supp. ___, 47 Fed. Reg. 40,392 (D.D.C. 1982).

[26] AMPS, in this regard, asserts that ICS/MCI's comments should have been filed with the Commission when the agency invited comments on the Capitalization Plan, not six months later.

36. Allegations concerning AT&T's Capitalization Plan will be considered and resolved in a separate decision ruling on the Capitalization Plan. Since ICS/MCI's allegations concern the Capitalization Plan generally, and are not peculiar to the Los Angeles market, the findings in our decision on the plan, will control the disposition of these issues. As in our previous decisions, we will condition the authorization here upon our approval of the plan. *See, e.g., Advanced Mobile Phone Service, Inc.* (*Chicago Order*), 91 FCC 2d 512 (1982), at n. 3 and para. 18.

Financial Qualifications

37. ICS/MCI, while recognizing that "AT&T has enormous resources which can be devoted to its cellular activities," nevertheless asserts that AMPS has failed to demonstrate that it is financially qualified as required by Sections 22.913(a)(8) and 22.917 of the Commission's Rules, 47 C.F.R. §§ 22.913(a)(8), 22.917. ICS/MCI notes, in this regard, that while AMPS "states that its Capitalization Plan contains the necessary documentation that demonstrates its financial qualifications, . . . that information is not available for public inspection since AT&T asked that it be afforded confidential status." AMPS, in reply, states that the Commission has previously ruled on this contention, as well as petitioner's contention that AT&T's financial non-disclosure request failed to satisfy Section 0.457(d) of the Commission's rules, 47 C.F.R. § 0.457(d), and, therefore, ICS/MCI's arguments are moot.

38. This allegation has already been considered and rejected by the Common Carrier Bureau in an order which the Commission declined to review. *Application of Advanced Mobile Phone Service, Inc.* (*Pittsburgh Order*), CC Mimeo 1169, released December 6, 1982, at para. 16, *review denied, Advanced Mobile Phone Service, Inc.*, FCC 83–111, released March 6, 1983. We here affirm the Bureau's conclusion that AT&T obviously has sufficent resources to construct the proposed systems. We do not agree with the implication of ICS/MCI's argument that we are holding AT&T to a standard different from that applicable to all other cellular applicants. AT&T has submitted all the information required to give reasonable assurance to this Commission that it is financially qualified, notwithstanding that insignificant portions of its showing were withheld from public disclosure.[27] The financial information in the Capitalization Plan has been incorporated by reference in all of AMPS' cellular applications. That information reveals that all of AMPS' proposed systems will cost $967.9 million in the 1982–1986 period (operating losses through 1984 are taken into account) and

[27] The portions witheld are: a pro forma income statement for the years 1983–1987; a statement of funds from operations through 1987; and a market forecast. None of these is critical to an assessment of AMPS' financial qualifications.

that AT&T will contribute $897 million in equity funding and the remainder in short-term advances.[28] There can be no doubt, based on publicly-available records, that AT&T has enough resources to fund this amount. The impending divestiture of the Bell Operating Companies does not change the result because AT&T is obligated to fund the BOC's at a level sufficient to enable them to remain financially sound, and because the executives of the Regional Holding Companies have certified that they can and will continue to develop and finance cellular service.[29] Accordingly, we concur with the Bureau that AT&T and the seven Regional Holding Companies, the *smallest* of which has assets of *$16 billion*, is financially qualified.

Interconnection

39. ICS/MCI's final arguments relate to AMPS' interconnection proposal. Recognizing that "the Commission has accepted this proposal in other proceedings," petitioner again expresses concern "that such arrangements will not be forthcoming "because it has already experienced difficulties with wireline carriers in the Los Angeles market, which have "been unreasonably slow in responding to requests for service." In short, ICS/MCI asserts that while it "believes that the interconnection proposal of AMPS is inadequate in fundamental respects, these deficiencies are accentuated by the inability of AMPS to insure competing carriers that they will receive the necessary interconnection arrangements throughout the [Los Angeles] SMSA."

40. We affirm the Bureau's rejection of this argument. In the *Pittsburgh Order*, *supra* at para. 13, it was determined that a sufficient interconnection proposal is described in two documents submitted by AT&T, and that both AT&T and AMPS are presently participating with many nonwireline applicants, among other parties, in Commission meetings to establish reasonable interconnection standards. Moreover, we emphasize that if reasonable interconnection arrangements have not been formulated by the time AMPS files an application for a license to operate its cellular system, any grant to AMPS will be an conditioned upon its providing reasonable interconnection.[30]

Ordering Clauses

41. Accordingly, IT IS ORDERED, pursuant to Section 22.29 of

[28] Because of the wireline agreements in 18 of the 30 largest markets, AMPS' funding requirements will be considerably less than the $967.9 million originally contemplated.

[29] Statements of the Regional Holding Company Presidents were submitted with a letter dated March 11, 1983, to the Chief, Common Carrier Bureau as a supplement to the Capitalization Plan.

[30] 89 FCC 2d at 81–82.

the Commission's Rules, that the Joint Request for Approval of Limited Partnership filed by Advanced Mobile Phone Service, Inc., GTE Mobilnet of Los Angeles, Incorporated, ConTel Mobilcom, Inc., United States Cellular Corporation and its parent Telephone and Data Systems, Inc. IS GRANTED and the accompanying November 2, 1982 Limited Partnership Agreement is APPROVED as consistent with the public interest, convenience and necessity.[31]

42. IT IS FURTHER ORDERED that the amendment to the Advanced Mobile Phone Service, Inc. application is ACCEPTED, that the amendment is exempted from the cut-off provisions under Section 22.31(e)(3) and (4) and that the amended AMPS application, File No. 26030-CL-P-(24)–82, IS GRANTED, conditioned upon the Commission's action on the AT&T Cellular Capitalization Plan submitted on May 25, 1982, as provided by Section 22.901(d)(3) of the Commission's rules.

43. IT IS FURTHER ORDERED that the request for withdrawal of the applications filed by GTE Mobilcom of Los Angeles, Incorporated, File No. 26053-CL-P-(34)–82, and ConTel Mobilcom, Inc., File No. 26038 CL-P-(6)–82 IS GRANTED and the applications are DISMISSED.

44. IT IS FURTHER ORDERED that the joint request for withdrawal of the application filed by Telephone and Data Systems, Inc. (TDS) and it's subsidiary, Cellular Corporation of Indiana, Indianapolis, Indiana, IS GRANTED and the application File No. 26131-CL-P-(9)–82, and Petitions to deny filed against them ARE DISMISSED.

45. IT IS FURTHER ORDERED that the authorization is conditioned upon AMPS filing an amendment to the limited Partnership Agreement which eliminates the language contained in Section 11.1 of the Agreement, imposing restraints on the alienation of partnership interests.[32]

46. IT IS FURTHER ORDERED that the authorization does not include any right to interference protection in any areas outside the Los Angeles SMSA, and further conditioned upon AMPS coordinating with future licensees of the Ventura SMSA, and upon providing interference free operation in these areas.

47. IT IS FURTHER ORDERED that the authorization is conditioned upon AMPS obtaining the appropriate antenna structure clearances.

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[31] In taking this action today, we are establishing the precedent for consideration of other wireline agreements. We expect the Chief, Common Carrier Bureau, to dispose of other agreements under delegated authority.

[32] The Commission will withhold issuance of AMPS' authorization until the amendment is received by the Mobile Services Division, Common Carrier Bureau. We also remind the partners that, pursuant to Section 212 of the Communications Act, officers or directors of more than one carrier are required to have authorizations to hold interlocking directorships.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Wireline Cellular Applicant Settlement Agreement in the Los Angeles, California, Standard Metropolitan Statistical Area.

I write separately here to emphasize that this Commission has now twice determined that settlements by mutually-exclusive cellular radio applicants are in the public interest, convenience and necessity and will be approved by the FCC in accordance with this statutory mandate. In reaching these determinations we have carefully and fully balanced any competing antitrust values of maintaining "competition" in cellular system applications with the demonstrated public interest in the rapid and efficient deployment of cellular technology and service. As we have now also repeatedly emphasized, while "competition" is an integral part of our public interest standard, it is not the whole of our statutory mandate: "[A]gencies are not strictly bound by the dictates of [the antitrust] laws . . .; rather, they are entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry. The agency's determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry." *United States* v. *FCC* (SBS), 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc) (citation omitted). We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement—and those settlements which I hope will follow on both the wireline and nonwireline sides of the split-frequency cellular allocation—enjoy the full measure of this Commission's approval.

March 31, 1983

STATEMENT OF COMMISSIONER ANNE P. JONES CONCURRING AND DISSENTING IN PART

IN RE: Cellular wireline settlement agreement in the Los Angeles, California, Standard Metropolitan Statistical Area

This order approves another part of the web of settlements by wireline carriers seeking to provide cellular communications service. While I concur in the result of the decision, which will make cellular service available in Los Angeles in the near future, I specifically dissent from its denial of the Department of Justice's very reason-

able request that this agency directly consider the public interest impact of its rhetoric encouraging cellular settlements.

As I have indicated previously, I do not believe it appropriate for this agency to adopt a "private settlement" procedure for choosing cellular licensees. I see no reason to believe that collusion among competing applicants serves the public interest. If the comparative hearing process ostensibly adopted for cellular applications is too slow, the Commission should further streamline that procedure or eliminate it in favor of a faster process. It should not follow a policy of de facto abdication of its duty to choose the licensee.

COMSAT
Corporate Organization
Satellite Communications

Petitions for reconsideration or clarification of the Commission's *Memorandum Opinion and Order* (adopted August 5, 1982) denied except to the extent indicated therein.
-COMSAT
CC Docket No. 80-634

FCC 83-121

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Changes in the corporate structure and operations of the Communications Satellite System	CC Docket No. 80-634

MEMORANDUM OPINION AND ORDER

(Adopted March 31, 1983 Released April 20, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER DAWSON CONCURRING AND ISSUING A STATEMENT.

I. *Background*

1. On August 5, 1982, we adopted our Memorandum Opinion and Order in the above-captioned proceeding, *Communications Satellite Corporation*, 90 FCC 2d 1159 (1982) (hereinafter *Structure).* We now have before us a Petition for Reconsideration or Clarification of this order filed on October 20, 1982, by Western Union International, Inc. (WUI) and a Petition for Partial Reconsideration filed on October 18, 1982, by RCA Global Communications, Inc. (RCA Globcom). Also before us are oppositions to these petitions submitted on November 17, 1982, by the Communications Satellite Corporation (Comsat) and Aeronautical Radio, Inc. (ARINC). In addition, on November 26 and November 29, 1982, respectively, WUI and RCA Globcom filed replies to the Comsat and ARINC oppositions.

2. In the *Comsat Study*,[1] we undertook a comprehensive examination of Comsat and its operations. In that study, we noted that

[1] Communications Satellite Corporation, 77 FCC 2d 564 (1980) (hereinafter Comsat Study).

Comsat had in recent years begun to engage in activities other than its traditional statutory INTELSAT/INMARSAT functions and we found a number of areas where those new activities might create conflicts with its appropriate discharge of those statutory functions. On balance, though, we found that the public interest would be served by allowing Comsat to participate in non-INTELSAT/INMARSAT business activities so long as such participation is not inconsistent with its statutory responsibilities. We did, however, identify a number of specific changes in Comsat's structure and operations we felt should be made. Following that order, Comsat voluntarily reorganized itself to separate its INTELSAT and INMARSAT operations from its other functions.

3. In the *Structure* order which followed, we again affirmed that the public interest would be served by allowing Comsat to participate in non-INTELSAT/INMARSAT business activities so long as such participation is not inconsistent with its statutory responsibilities. We also said that Comsat's participation in all present and future non-INTELSAT/INMARSAT activities would be through its subsidiaries only; the parent organization would be limited to INTELSAT/INMARSAT functions.[2] We found that Comsat's reorganization generally conformed to this approach. However, in reviewing Comsat's reorganization, we found several areas where we believed Comsat's efforts had not gone far enough to answer the concerns we stated in the *Comsat Study.*These deficiencies concerned Comsat's accounting for research and development, its accounting for shared administrative and support services and its method of public dissemination of INTELSAT/INMARSAT information. We directed Comsat, within 90 days of the release of the order, to file with us reports explaining how it intended to establish mechanisms to remedy these deficiencies.[3] We stated that if Comsat were unable to implement appropriate accounting and information flow control mechanisms, then we would consider whether further structural separation is warranted.

II. *Summary of Petitions*

4. RCA Globcom seeks partial reconsideration of the *Structure* order in two respects. First, it requests us to modify the *Structure* decision to require that Comsat provide all communications services to non-carriers, including basic INTELSAT satellite transmission capacity at the earth stations[4], exclusively through a retail subsid-

[2] We use the terminology "Comsat parent" in this order to refer to that part of the parent company which performs certain international common carrier functions and related duties with respect to the INTELSAT and INMARSAT systems. This entity is called the World Systems Division.

[3] Two extensions were granted. Comsat filed a report on information flow on December 13, 1982 and a report on allocation of shared services and capitalization of Comsat Labs on January 24, 1983.

iary. RCA Globcom wants this modification to remain in effect at least until we have concluded our inquiries in CC Dockets Nos. 82–540 and 82–548 into the right of other carriers to have direct access to INTELSAT space segment and independent ownership of U.S. earth. stations that operate with the INTELSAT system.[5] Second, it requests that, during the pendency of these proceedings, we establish adequate controls over rates to be charged by the subsidiary.

5. WUI seeks reconsideration or clarification of the order in six respects. First, it asks us to require Comsat to provide all non-carrier services through a separate subsidiary, irrespective of whether those services are provided at customers' premises or at earth stations. Second, it requests that we afford WUI and the other international service carriers access to INTELSAT information by granting them observer status at INTELSAT meetings. Third, it contends that we should restrain Comsat from serving end users until Comsat remedies the problems identified in the *Structure* order. Fourth, it argues that we do not have power under the Communications Satellite Act of 1962, 47 U.S.C. §§701–744 (1976), to authorize or permit Comsat to engage in any activities other than those which are not intimately connected with, and directly and substantially in furtherance of, its limited statutorily mandated INTELSAT and INMARSAT missions. Fifth, it argues that our proposed structural and operational changes to Comsat will not adequately preserve competition or protect the public interest. Finally, WUI requests that we immediately grant its pending requests for: (1) cost-based access to INTELSAT space segment rates; (2) unbundled rates for the space-segment and earth-segment components of INTELSAT service; and (3) independent access and operational capability at the U.S. INTELSAT earth stations.

6. In the following sections we shall address each argument raised by RCA Globcom and WUI. At the same time, we shall consider matters raised by the responsive pleadings filed by the parties.

III. *Discussion*

A. *Applicability of separate subsidiary requirement to the provision of INTELSAT transmission capacity.*

1. Arguments of the parties on separate subsidiary issue

7. The parties to this proceeding are polarized on the issue whether Comsat should be required to provide INTELSAT transmis-

[4] The Structure order used the term "basic transmission capacity" to refer to INTELSAT transmission capacity. However, in order to avoid any possibility of confusion with the definition of "basic" in other Commission proceedings, we will henceforth refer to this capacity as INTELSAT transmission capacity.

[5] INTELSAT Satellite Facilities, 90 FCC 2d 1446 (1982) (hereinafter Direct Access); U.S. Earth Stations, 90 FCC 2d 1458 (1982) (hereinafter Earth Station Ownership)

sion capacity to non-carrier users through a separate subsidiary, rather than through the parent. Both WUI and RCA Globcom argues that the service should be provided through a separate subsidiary, at least until we resolve the *Direct Access* and *Earth Station Ownership* inquiries. Comsat and ARINC disagree.

8. WUI argues that our action in the *Authorized User* order[6] was contrary to our pronouncements in the *Structure Order.* WUI sees possible contradictions in two areas - the definitions of "monopoly" and "competitive" services and the determination of which arm of Comsat would provide each type of service. As to the first point, WUI claims that the Commission recognized in *Authorized User* that provision of "basic" transmission capacity to non-carriers is a "competitive" service.[7] WUI cites the following language in the decision as the basis for its claim: "Even if Comsat elects to limit itself to its current role of providing basic satellite transmission capacity at U.S. earth stations, affording customers the opportunity to deal directly with Comsat will impose competitive pressures on the existing carriers." 90 FCC 2d at 1142. In addition, WUI argues that competition has already developed between Comsat and WUI in the provision of "basic" transmission capacity to DOD at earth stations in Hawaii and Guam. WUI states that such competition will divert leased channel revenues from the international record carriers. WUI believes, however, that the definition of a "competitive" service as used in the *Structure* order may not encompass the provision of INTELSAT transmission capacity. WUI notes that the *Structure* order defines "competitive" as referring to all existing and future non-INTELSAT/INMARSAT activities in which Comsat engages. 90 FCC 2d at 1172 n.9. WUI states that it is unsure whether or not the provision of "basic" transmission capacity would be classed as an INTELSAT or a non-INTELSAT activity within the meaning of this definition. WUI concludes that if we meant "basic" transmission capacity to be an INTELSAT monopoly activity, such a result would be inconsistent with our pronouncements in *Authorized User.*[9]

9. The other inconsistency between the *Authorized User* and

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[6] Authorized Users Policy, 90 FCC 2d 1394 (1982), *review pending sub nom.* RCA Global Communications, Inc. v. FCC, No. 82–1972 (D.C. Cir., filed August 20, 1982), *case consolidated with* ITT v. FCC, Nos. 79–1046 *et al.* (D.C. Cir. filed January 12, 1979) (hereinafter Authorized User).

[7] In Authorized User we defined "basic transmission capacity" as a two-way communications link–called a half circuit–between a U.S. earth station and an INTELSAT satellite. Provision of "basic" or INTELSAT transmission capacity does not include the making of additional service arrangements including those with a U.S. domestic carrier for connecting circuits to the U.S. earth station and with a foreign telecommunications entity for the foreign satellite half circuit and the necessary connecting links within the foreign country. 90 FCC 2d at 1402–03.

[9] Similarly, WUI states that if we intended by this definition to exclude from competition the provision to non-carrier users of "basic" transmission capacity,

Structure orders, WUI alleges, relates to which subdivision of Comsat we directed to provide competitive services. WUI reads the *Structure* decision as restricting the parent to monopoly INTELSAT/INMARSAT activities and allowing competitive activities only in the subsidiaries. WUI notes, however, that the *Authorized User* order directs the parent to lease INTELSAT transmission capacity to non-carriers. Since, WUI argues, the provision of INTELSAT transmission capacity is competitive with IRC leased-channel service[8], WUI concludes that our *Authorized User* order thereby directs the Comsat parent to provide a competitive service in conflict with the limitation set out in the *Structure* decision. Therefore, WUI alleges these companion orders have this additional inconsistency.

10. RCA Globcom does not argue that the *Structure* order contradicts the *Authorized User* order, but that the latter order is wrong in that, by allowing the Comsat parent to mix competitive and monopoly activities, it fails to protect fair competition and important user interests.[10] Since it believes that *Authorized User* is incorrect, it asks us to change the *Structure* order to bring it into conformity with our alleged earlier recommendations in the *Comsat Study*, *supra*, by requiring Comsat to provide all communications services to non-carrier users, including INTELSAT satellite transmission capacity, exclusively through its "retail" subsidiary. RCA Globcom Petition, p. 8.

11. RCA Globcom states that, absent such safeguards, the actions we took, which were purportedly taken to foster competition, will have the opposite effect of giving Comsat a *de jure* monopoly over the provision of "basic" transmission capacity to users at the earth stations long before we have had a chance to determine whether INTELSAT services should continue to be provided on a monopoly basis. This monopoly is accentuated, RCA Globcom argues, because *Authorized User* directs the Comsat parent to lease INTELSAT satellite transmission capacity to carriers and to non-carriers at the same rate. It believes that such a result is directly contrary to the thrust of the *Comsat Study* which it asserts envisions that a subsidiary provide such capacity to non-carriers. RCA claims that it cannot engage in meaningful price competition under such circumstances and that, as a result, a considerable portion of its and the other international service carriers' revenues are at risk. Also, RCA Globcom avers that important consumer interests will be jeopardized by our policy. It argues that consumers may construct their own

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then the *Structure* order is also "internally inconsistent and totally at odds with reality." WUI Petition, p. 6.

[8] *See* para. 8, *supra*.

[10] Nevertheless, RCA Globcom contends that it is not challenging the *Authorized User* decision, but that it merely seeks "safeguards to preserve the *status quo* while the Commission resolves the claims of other carriers that they should not have to use Comsat as a middleman for access to INTELSAT." RCA Globcom Petition, p. 2.

domestic facilities near the INTELSAT earth stations and, thus, become locked into Comsat's monopoly service for long periods of time. Finally, it claims that there will be a substantial diversion of traffic caused by the Comsat parent's entry into the "retail" market and this diversion will idle existing facilities, and shift those costs to users of remaining facilities.

12. In its opposition, Comsat asserts that the petitioners' contention that we should not have permitted the Comsat parent—as opposed to a Comsat subsidiary—to provide "basic" transmission capacity to non-carrier entities is improperly raised here. Comsat argues that the petitioners should have raised their arguments in the *Authorized User* proceeding since that is where we determined that the Comsat parent should provide such "basic" capacity. Comsat contends that even if the petitioners' arguments of inconsistency and of lack of promotion of competitive policies were valid, the relief that RCA Globcom and WUI seek is not a change in the *Structure* order to conform to *Authorized User*, as they assert, but a change in the *Authorized User* order to conform to *Structure* —relief which cannot appropriately be granted in this proceeding.

13. Although Comsat raises this procedural point as a threshold issue, it also addresses the substance of the petitioners' arguments. In so doing, it disputes the petitioners' contentions of inconsistency among the *Authorized User*, the *Structure* and the *Comsat Study* proceedings. It reads the *Comsat Study* and *Structure* proceedings as limiting the Comsat parent to performing jurisdictional monopoly—defined as INTELSAT/INMARSAT—activities while allowing the subsidiaries to carry out all other ventures. Further, it contends that it is the *Authorized User* proceeding, not the *Comsat Study* or *Structure* proceedings, which defined the contours of Comsat's INTELSAT jurisdictional monopoly activities. First, Comsat argues that the *Authorized User* decision clarified that the provision of "basic" satellite capacity is an INTELSAT jurisdictional monopoly activity. Second, Comsat points out that in *Authorized User* we interpreted the the term "authorized users" in the Satellite Act to include non-carrier entities. Comsat concludes that we thus found that non-carrier entities are entitled to obtain "basic" INTELSAT satellite capacity directly from Comsat. Comsat concludes that the provision of such satellite capacity to non-carriers is a jurisdictional monopoly activity and that it should therefore be provided by the parent consistent with the requirements of the *Structure* order.

14. ARINC, in its opposition, states that RCA Globcom's and WUI's petitions are nothing but attempts to attack collaterally the Commission's determination in *Authorized User* that users should be permitted to acquire satellite capacity from Comsat on the same terms and conditions as the international record carriers. ARINC contends that we should not further delay the public benefits which

we have found will accrue from permitting non-carrier users to obtain "basic" INTELSAT capacity directly from Comsat.

15. ARINC also finds no inconsistency among the Commission's decisions. ARINC notes that our *Structure* order defines "competitive" to include "existing and future non-INTELSAT/INMARSAT activities engaged in by Comsat." 90 FCC 2d at 1172 n.9. ARINC asserts that the provision of "basic" satellite capacity is an "INTELSAT activity" since Comsat currently obtains the space-segment and earth-station services it provides users as a result of its role as the United States signatory to INTELSAT and that the provision of such capacity therefore does not fall within the scope of "competitive" services as that term is used in the *Structure* order. Further, since, at present, Comsat is the only entity authorized to acquire satellite circuits directly from INTELSAT, ARINC argues that the provision of this capacity to Comsat's customers, such as tht international record carriers (IRCs), DOD, ARINC, and others, cannot be deemed "competitive" even in the ordinary sense of the word. ARINC contends that the mere desire of the IRCs to become competitors in providing such capacity does not in and of itself change the nature of the service from monopoly to competitive.

16. RCA Globcom in its reply disputes Comsat's procedural arguments and contends that we can grant the relief sought in either the *Authorized User* or the *Structure* proceeding. RCA also reasserts its view that the provision of "basic" capacity is "competitive" with the IRCs' leased channel services and that Comsat's position that "basic" INTELSAT transmission service is "jurisdictional" is irrelevant to the issue involved, since both INTELSAT transmission and end-to-end services are "jurisdictional" to the extent that they fall within Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–224 (1976). It further states that equality of competitive opportunity can be achieved only if the Comsat parent is prohibited from providing either type of service directly to non-carrier users.

17. WUI in its reply claims that Comsat's opposition is essentially procedural and not helpful to the Commission's resolution of the substance of the issues. WUI notes that Comsat did not deny that the *DOD Hawaii-Guam* [11] case demonstrated that Comsat and WUI were "competitors" for DOD's "private line" business at the earth stations. [12] WUI Reply, p.3 WUI also faults ARINC's opposition for failing to justify its claim that the Commission's interrelated satellite orders of August 5, 1982 are clear and complete.

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[11] Western Union International, Inc. v. Communications Satellite Corporation, CC Docket No. 81–356 (released December 10, 1981) (hereinafter, DOD Hawaii-Guam)

[12] We are not certain what WUI means by the term "private line" in this connection. We assume that WUI is referring to IRC leased channel service. *See* 90 FCC 2d at 1397 n.3.

2. Discussion of separate subsidiary issue

18. As an initial procedural matter, we question whether the relief sought appropriately may be granted in this proceeding. We shall first address WUI's arguments. WUI does not argue with our findings in *Structure* that the Comsat parent shall provide jurisdictional monopoly services and the Comsat subsidiary(ies) shall provide other than jurisdictional monopoly services.[13] Rather, WUI disagrees with our treatment in *Authorized User* of the provision of INTELSAT transmission capacity to non-carriers as a jurisdictional monopoly service. Therefore, WUI is really asking us to change our definition in *Authorized User*, not in *Structure*.

19. Similarly, RCA Globcom argues that the relief it seeks is necessary because our decision in *Authorized User* is directly contrary to the thrust of the *Comsat Study*. RCA Petition, p. 6. Again, even were we to accept RCA Globcom's argument, the appropriate relief would be a modification of the *Authorized User* decision and not the *Structure* decision. The *Structure* decision does not even mention the provision of INTELSAT transmission capacity; it merely states that activities in furtherance of Comsat's INTELSAT functions are to be provided by the parent and non-INTELSAT activities by the subsidiary(ies). The *Authorized User* decision clarifies the status of the provision of INTELSAT transmission capacity as an INTELSAT activity regardless of whether it is provided to carriers or directly to non-carrier users. It is this latter interpretation with which RCA Globcom takes issue here and for which it seeks relief. As a result, RCA Globcom is similarly seeking relief which cannot appropriately be granted in this proceeding.

20. Although we could dismiss this aspect of the petitions on procedural grounds, we believe that the petitioners have misconstrued our *Structure* and *Authorized User* orders, as well as the nature of the service Comsat will be providing, and that it would be helpful for us to clear up those misunderstandings. First, we will discuss the allegations of inconsistency and, second, the allegations of unfairness. The petitioners have argued that our orders are inconsistent in that they could allow the Comsat parent to engage in competitive activities which we have found it should not engage. The petitioners have each alleged a different inconsistency. WUI contends that the *Structure* decision is inconsistent with the *Authorized User* decision, while RCA Globcom seems to be contending that both the *Structure* and *Authorized User* decisions are inconsistent with the *Comsat Study*.

21. As noted in paras. 8 and 9, *supra*, WUI believes that our

[13] Jurisdictional monopoly services are those granted to Comsat by virtue of its unique roles under the Communications Satellite Act of 1962, 47 U.S.C. §§ 701–744 (1976). They are not necessarily delineated by economic forces or theories, such as those arising from a natural monopoly position.

Authorized User policy directed the Comsat parent, rather than a subsidiary, to compete for what WUI characterizes as the "private line" business of larger users at the U.S. earth stations. WUI reasons that since it and other carriers intend to compete with Comsat for this "private line" business the provision of such service must then be a competitive and not a monopoly activity. It follows, argues WUI, that to be consistent with *Structure*, a Comsat subsidiary, rather than the parent, should have been required to provide this service.

22. We disagree with WUI's analysis. The *Authorized User* order did not direct, or even allow, the Comsat parent to offer "private line" service to large users. Rather, it directed the Comsat parent to make available to all users only INTELSAT satellite-transmission capacity at U.S. earth stations. Nothing in the *Authorized User* decision alters the fact that Comsat is currently the only entity with access to this INTELSAT capacity. Because of Comsat's unique position, the provision of INTELSAT capacity is effectively a monopoly service. The nature of this monopoly service, which had previously been supplied primarily to carriers, does not change because Comsat may now supply it directly to non-carriers, who are also potential customers of end-to-end carriers. Since in either case the provision of INTELSAT satellite capacity is essentially the same service, it retains its monopoly characteristics, independent of the nature of the buyer. Further, the Comsat parent realizes no additional profit by providing capacity directly to non-carriers, than by providing the same capacity indirectly to non-carriers through "middlemen" carriers who put together an "end-to-end" service. Therefore the Comsat parent cannot be said to be competing with the end-to-end carriers for "private line" service to non-carrier users since Comsat is indifferent financially as to whether it leases capacity directly or indirectly to these users.

23. Nowhere in the *Authorized User* order did we state, or even imply, that the provision of INTELSAT transmission capacity is a competitive activity. We did recognize that the provision of end-to-end service is a competitive activity when we stated that Comsat's entry into the end-to-end market would increase competition in that market.[14] We did not treat the provision of INTELSAT capacity in a similar fashion. Instead, we distinguished between a competitive activity and an activity which only exerted "competitive pressures." We reasoned that provision of INTELSAT capacity to non-carrier users does not include services traditionally provided by end-to-end carriers. Instead we said that a user must make its own communications arrangements for the facilities necessary to transmit its

[14] ". . . . our decision permits Comsat to provide additional end-to-end sevices directly to the pulic. Although Comsat has expressed no present intention to do so, we find that the industry would benefit from entry of a new competitor such as Comsat which has the resources and experience to play a major role in providing satellite services to the public." 90 FCC 2d at 1420.

message between its office and a U.S. earth station, and must also make its own arrangements with a correspondent for the foreign end of the circuit. Under this scheme, the existing carriers would not be competing with Comsat to serve non-carrier users, although they would be under "competitive pressures" to reduce their end-to-end rates. The competitive pressures arise because of the possible differences in the charges set by carriers to provide the domestic and foreign segments of international service with the costs to users of making their own domestic and foreign arrangements. Comsat's provision of INTELSAT capacity is the same in either case. Further, pursuant to Comsat's *Authorized User* tariff, this INTELSAT satellite capacity is available to carriers and non-carriers at the same rate and on the same terms and conditions. Thus, giving non-carrier users the option of dealing directly with Comsat for monopoly satellite capacity permits these users to decide whether they can arrange a better deal for the additional facilities and services necessary to complete an end-to-end service than that offered by the existing "middlemen" carriers. The availability of this option to users does not make the provision of INTELSAT transmission capacity "competitive" with the provision of end-to-end service, because INTELSAT capacity is an input to end-to-end service, not a substitute for it.[16]

24. The competitive/monopoly distinction in the above decision is also consistent with that in our *Structure* order. In the *Structure* order we defined "competitive" as follows: "We use the term competitive in this document to refer to existing and future non-INTELSAT/INMARSAT activities engaged in by Comsat." 90 FCC 2d at 1172, n.9. Therefore, non-competitive refers to existing and future INTELSAT/INMARSAT activities engaged in by Comsat. Looking at the INTELSAT side, we observe that the furnishing of INTELSAT transmission capacity—defined as the provision of INTELSAT half circuits—is clearly an INTELSAT activity, and thus "non-competitive" within the meaning of the *Structure* dichotomy.[17]

25. As we have indicated, the fact that Comsat's provision of INTELSAT capacity is non-competitive does not change simply because Comsat offers it directly to non-carriers as well as to carriers. Under current policy, Comsat is the only entity authorized

[16] When we indicate that our Authorized User decision has not provided for direct competition in the provision of INTELSAT capacity (earth segment and space segment) between the Comsat parent and the end-to-end carriers, we do not imply that this decision has not altered the structure of the market. It has, of course, intentionally done so. But the "competition" it creates is among the end-to-end carriers who are competing both with each and with potential customers for the "packaging" type functions required to put together an end-to-end service.

[17] We are not taking issue with WUI's assumption that "private line" or "leased channel" service is competitive. Indeed, the Authorized User decision found that Comsat can provide "leased channel" service only through a subsidiary. *See* 90 FCC 2d at 1421.

to participate in INTELSAT and is therefore the only entity who can supply INTELSAT capacity in the United States. We, therefore, recognize that competition in the form of additional suppliers of INTELSAT capacity is virtually impossible under current INTELSAT earth station and space segment access policies.[18] In fact, one of the reasons we have instituted the inquiries in CC Dockets Nos. 82–540 and 82–548 is to gauge the possibility of competition in the provision of INTELSAT capacity. Should we find such additional competition feasible and desirable, we can take any actions to implement that finding—including further changes to Comsat's corporate structure and operations—at that time. Until such time, however, we find no public interest benefit to be gained from trying even temporarily to make the provision of INTELSAT capacity "competitive" by inserting a layer of carrier middlemen between the sole supplier of such capacity, Comsat, and its non-carrier customers. Such a scheme would only produce inefficiency as far as non-carrier users are concerned. The benefits of the *Authorized User* policy are primarily in the "add-on" category; users can now benefit if they can perform the services added by end-to-end carriers to Comsat's INTELSAT service more efficiently than the carriers themselves perform these services.

26. Therefore, we reject WUI's arguments that the *Authorized User* decision improperly directed the Comsat parent to provide INTELSAT transmission capacity. Such provision is a monopoly INTELSAT activity which the *Structure* decision correctly relegated to the parent company.

27. RCA Globom makes a somewhat different argument concerning inconsistencies. RCA Globcom recognizes that both the *Authorized User* and the *Structure* decisions provide that the Comsat parent lease INTELSAT transmission capacity at U.S. earth stations to non-carrier users as well as to carriers. However, RCA Globcom argues that such a policy is inconsistent with the policy of the *Comsat Study*. We do not find this argument persuasive. The recommendations in the *Comsat Study* were clearly only tentative findings pending completion of a notice and comment rulemaking proceeding. All of the findings in the *Structure* decision are not necessarily present in the *Comsat Study*. Therefore, resolution of this issue is not relevant to the instant reconsideration. Nevertheless, in the interests of clarity, we shall address RCA Globcom's argument to determine if the *Comsat Study* recommendation differs from the procedures adopted in the above decisions.

28. RCA Globcom cites the following language in the study:

> The structural changes we describe in this Report would establish a framework to locate all of Comsat's jurisdictional monopoly activities with [the

[18] However, some form of competition is feasible through the offering of services over substitutable media, such as coaxial or fiber optic submarine cable.

> Comsat parent] Comsat Global . . . . [These] jurisdictional monopoly activities will be isolated from activities in the competitive environment in which the corporation could engage through its Comsat National subsidiary. COMSAT Global would be required to sell INTELSAT half-circuits including space segment and ground segment (earth station services), to all competitive retailers on fair and equal terms pursuant to tariff. . . . [the Comsat competitive subsidiary] Comsat National could enter the competitive retail market for provision of international satellite services directly to end-users. 77 FCC 2d at 750 (footnote omitted)[19]

RCA Globcom apparently believes that our failure to include in this paragraph the lease of INTELSAT half circuits to non-carriers was intended to indicate that the Comsat parent is not to offer them.[20] We disagree. First of all the focus of this sentence was simply to make it clear that when Comsat provided this capacity to the end-to-end carriers it had to make it available on fair and equal terms pursuant to tariff. Moreover, the *Comsat Study* was adopted well before we issued our *Authorized User* order and, thus, could not dispose of matters which were still at issue in the then pending *Authorized User* rulemaking. We note, however, that the *Comsat Study* cited (in a footnote to the same paragraph quoted by RCA Globcom) proposals in the *Authorized User-NPRM* [21] which were intended to allow non-carrier entities to obtain INTELSAT half circuits (what *Authorized User* called "basic" INTELSAT transmission capacity) for their own use.[22] The *Comsat Study* further recognized that this NPRM proposed to treat these non-carrier entities as "authorized users" with the authority to acquire space segment directly from Comsat's monopoly arm (i.e., the parent).[23] It is thus apparent that when we decided the *Comsat Study* we were aware of the fact that the Comsat parent would likely be authorized to deal directly with non-carrier users. Therefore, we conclude that these *Comsat Study* recommendations are not inconsistent with both the *Authorized User* and *Structure* orders.

29. Finally, both petitioners make arguments based on equity for preventing the Comsat parent from offering capacity to non-carriers.

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[19] Comsat Global was used to refer to the parent company and Comsat National to a subsidiary.

[20] RCA Globcom also believes that the Commission's use of the term "jurisdictional" in this quotation is irrevelant to a determination of whether basic service should be provided by the parent or by a subsidiary. RCA Globcom believes that "jurisdictional" means all services subject to Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–224 (1976). We disagree with this interpretation. The quotation speaks of "jurisdictional monopoly" activities, not merely "jurisdictional" activities. As indicated in footnote 12, *supra*, by "jurisdictional monopoly" we were referring to Comsat's role under the Communications Satellite Act of 1962, 47 U.S.C. §§ 701–744 (1976). A part of this role is to provide INTELSAT half circuits—"basic" transmission capacity—to authorized users.

[21] Aeronautical Radio Inc., *et al.*, 77 FCC 2d 535 (1980) (hereinafter Authorized User-NPRM)

[22] 77 FCC 2d 750 n.245.

[23] 77 FCC 2d 752.

They claim that allowing Comsat to lease INTELSAT capacity to non-carrier users will allow Comsat to capture the major share of this market before we have had a chance to decide the issues of direct access and independent earth station ownership. They contend that Comsat's "basic" INTELSAT service customers will be permanently lost to them because of the timing advantage Comsat would have. Further, they contend that traffic will be diverted from their private line services to Comsat's INTELSAT transmission service.

30. We do not agree with these bleak predictions of future harm. If the IRCs and other carriers are permitted at some future time to compete for some or all aspects of the provision of INTELSAT satellite capacity they should be able with superior price and/or service to attract Comsat's customers. There may be some cases in which Comsat has received a relatively long term commitment from a customer so that the customer is not immediately in a position to obtain competitive services from these carriers. We believe, however, that such situations will constitute a small share of the market. As to diversion of traffic from IRC private line service to Comsat's INTELSAT transmission service, we have recently addressed this issue in our order authorizing Comsat to provide INTELSAT transmission capacity directly to non-carriers. In that order, we found that the conclusions of the RCA submitted traffic and revenue diversion study were speculative and that any diversion of traffic that may occur would not likely to be so substantial as to threaten the IRCs' ability to provide service to the public.[24] Therefore, we see no reason to withhold the benefits of reduced costs to those customers who can efficiently use INTELSAT satellite capacity by providing themselves the services added by end-to-end carriers. We find that the benefit of this customer choice outweighs the above speculative detriment to a framework for the competitive provision of INTELSAT capacity that may result from future Commission actions.

B. *Commission measures to ensure that the separate subsidiary establishes just and reasonable charges.*

31. RCA Globcom addressed ways it believes the separate subsidiary approach in the *Structure* decision should be strengthened to promote competition. RCA Globcom contends that merely requiring Comsat to operate through a separate subsidiary in all its "retail" ventures will not, without supplemental safeguards, adequately protect other carriers from anti-competitive abuses or avoid burdening INTELSAT ratepayers while the Commission is resolving the *Direct Access* and *Earth Station Ownership* proceedings. It asks us to establish additional procompetitive safeguards to assure that

[24] Communications Satellite Corporation, FCC 83-41 (released February 2, 1983). *See also* Authorized User, 90 FCC 2d at 1415-19.

the subsidiary establishes lawful charges, free of any cross-subsidization or misallocation of costs resulting from its corporate affiliation with the parent company. It argues that such safeguards should be established by modifying the *Structure* order in three respects. First, it asks us to affirm that the subsidiary must have separate officers, facilities, advertising and marketing, records and books of account, procurement, and operating personnel from the parent. Second, it requests us to scrutinize carefully Comsat's response pertaining to changes in allocation of common costs ordered by the *Structure* decision. Finally, it requests us to require the Comsat subsidiary to justify any rate initiatives on the basis of fully allocated costs.

32. Comsat, in its opposition, contends that RCA Globcom's argument is not germane to the order under reconsideration. Comsat states (1) that the Commission has already approved of Comsat's organizational changes, (2) that the Commission has already made clear that it would scrutinize Comsat's allocation of costs, and (3) that once the *Structure* issues are resolved by the Commission, there is no reason to treat the rates of a Comsat subsidiary differently from those of other carriers. ARINC's opposition avers that RCA Globcom's argument is not novel and was adequately considered by the Commission in Dockets Nos. 80-170 and 80-634.

33. We shall address RCA Globcom's contentions in the same order as RCA Globcom presents them. First, to the extent that the *Structure* order only implicitly described the structural separation required between the Comsat parent and its competitive subsidiaries, we shall now state these separation requirements more explicitly. We affirm the *Structure* conclusion that Comsat's current organization is generally adequate. Under Comsat's current structure, the parent has separate officers, records and books of accounts, and operating personnel from the subsidiaries. The parent and subsidiaries also provide their own facilities and their own financial, personnel, procurement, advertising and marketing services, except for sharing of certain corporate administrative support services and the laboratories. We said in the *Structure* decision that we would permit this limited sharing of resources if Comsat submitted a plan to ensure proper allocation of common costs associated with such sharing. We also said that if Comsat is unable to establish appropriate accounting and information control mechanisms, then we would consider whether additional structural separation is warranted. We have not as yet completed evaluation of Comsat's plans and therefore have not made a final decision as to the required degree of separation. We also note that we have required Comsat to provide us with 90 days notice if it intends on its own initiative to alter the current structure of the company. If we should receive such notification, we shall determine at that time if the new proposed structure adequately addresses our goal of maximal separation of

competitive and regulatory activities and properly handles the allocation of any justifiable common costs.

34. Second, we have already instructed the Chief, Common Carrier Bureau, to assess the proposals submitted by Comsat to remedy the problems we raised in the *Comsat Study* and the *Structure* orders and to apprise Comsat of any deficiencies found. 90 FCC 2d at 1198. These proposals relate to deficiencies in Comsat's allocation of research and development costs among regulated and unregulated accounts, its accounting for its labs, its accounting of shared administrative and common costs, and its procedures for use and dissemination of technical data generated by INTELSAT and INMARSAT funded work. We direct the Bureau to scrutinize carefully these proposals in order to assure that our policies are effectively implemented.

35. Finally, we note that no Comsat subsidiary has yet filed an application for authority to provide any end-to-end communications service between the United States and overseas points and that there is no tariff covering such service. Hence, only fears that such filings devoid of cost justification might be forthcoming have been cited. We believe that our rules adequately address such fears. For example, if an existing Comsat subsidiary were to file a tariff for such a service, it would be subject to Section 61.38 of the Commission's Rules and Regulations, 47 C.F.R. § 61.38 (1981). In particular, Section 61.38(a) requires that economic data and information be submitted to support a tariff request for a new service. Therefore, we will be in a position to determine if the tariff is justified and we conclude that no additional rules are required to satisfy WUI's request.

C. *Observer status at INTELSAT meetings*

36. WUI cites the Commission's finding in *Structure* that Comsat has an advantage over competitors by reason of its access to information flow from INTELSAT. It believes, though, that our proposed remedy in that order under what it terms the "Freedom of Information Act" is cumbersome and does not offset Comsat's lead time advantages. It restates its earlier proposal to allow the international carriers observer status at INTELSAT meetings. It asks that we instruct Comsat to advocate this position before INTELSAT. Comsat, in its opposition, states that this matter has already been fully briefed by the parties and fully considered by the Commission. It argues that WUI presents no new facts or analysis here.

37. First, we also affirm our conclusion in the *Comsat Study* that the INTELSAT Agreement does not explicitly provide for attendance of private corporations or entities as observers at INTELSAT meetings. On the issue of whether or not such attendance is implicitly permitted by the INTELSAT Agreement, the Department of State would be the appropriate agency to render an interpretation

on this point. In any case, we believe that carrier attendance at meetings is not necessary at this time to offset possible advantages that Comsat may gain as signatory. In the *Structure* order, we have directed Comsat to broaden public access to INTELSAT Board of Governor's documents consistent with requirements imposed on us by the Freedom of Information Act. We have also prohibited Comsat from releasing these documents to its subsidiaries before release to the public. We believe these measures should be sufficient to satisfy any concerns about possible lead time advantages Comsat's subsidiaries may have over competitors. However, we have not permantently foreclosed consideration of carrier observer status should future conditions warrant and should the Department of State issue an opinion that some form of private participation is implicitly permitted by the Agreement.

D. *Restraint on Comsat's service to users pending resolution of structure issues*

38. WUI has asked that we restrain Comsat from serving end users unless and until Comsat remedies the problems set forth in the *Structure* order. It argues that Comsat could be competing for "earth station forward" services [25] with WUI and others for an indefinite period of time, during which period Comsat could continue to misuse its monopoly powers and to misallocate costs—all to the detriment of its carrier competitors. Comsat states in its opposition that this complaint is wholly frivolous and does not warrant substantive response.

39. We find that WUI's concerns have already been adequately addressed by our *Authorized User* order. In that order, we distinguished between two types of international service Comsat may offer to users through the INTELSAT system. The first type is the provision of INTELSAT capacity." As we have earlier indicated, this service is currently provided on a monopoly basis. Therefore, we see no need to condition the offering of this service to users on the implementation of competitive safeguards contained in the *Structure* order.[26] The second type is the provision of so called "end-to-end" communications service between the United States and overseas points. This type of service, should Comsat choose to initiate it, would be provided by a subsidiary on a competitive basis. The *Authorized User* order states that as a condition of providing this latter service, Comsat must comply with the requirements set forth

[25] WUI does not define "earth station forward" service. Notwithstanding, we shall address WUI's argument giving the term its broadest possible interpretation in this INTELSAT context.

[26] *See* Paragraph 108 of the Authorized Users order in which we required Comsat to file for appropriate amendments to its Section 214 authorizations and its FCC Tariff No. 101.

in the *Structure* decision. 90 FCC 2d at 1435. We see no reason to change this requirement. Therefore, before any Comsat subsidiary is authorized to provide any international communications service through INTELSAT, we will verify that Comsat has made sufficient changes in its accounting, cost allocation and information flow procedures which satisfy the concerns we expressed that decision.

E. *Restrictions on Comsat's business activities*

40. WUI argues that, as a matter of law, all of Comsat's activities must be intimately connected with, and directly and substantially in furtherance of, its statutorily mandated and limited INTELSAT and INMARSAT missions. It avers that the Commission may not legally authorize or permit Comsat to expand beyond these activities into regulated or unregulated markets. In its opposition, Comsat contends that this argument has been fully briefed by the parties and fully considered by the Commission. It believes that WUI has presented no new facts or analysis here.

41. WUI has presented no new facts or analysis to support changing our prior findings. In the *Structure* order, we affirmed our *Comsat Study* determination that no legal bar exists to Comsat's participation in non-INTELSAT/INMARSAT business so long as such participation is not inconsistent with Comsat's statutory responsibilities under the 1962 Satellite Act or its Articles of Incorporation. We also affirmed in the *Structure* order our prior determination in the *Comsat Study* that as a matter of law and regulatory policy Comsat should not be limited to its INTELSAT/INMARSAT roles. We reasoned that Comsat's involvement in diversified satellite-related activities would contribute to the overall development of satellite communications technology and would therefore serve the public interest. We do not believe WUI has shown anything to justify changing those determinations.[27]

F. *Adequacy of structural and operational changes*

42. WUI argues that the Commission's proposed structural and operational changes to Comsat will not be adequate either to preserve competition or to protect the public interest. It avers that the the Comsat parent and subsidiary(ies) will have both the incentive and the ability to engage collusively in anticompetitive activities, conflicts of interest and cross-subsidization schemes. Neither Comsat nor ARINC addressed this contention in its opposition.

43. WUI does not specify what relief it seeks were we to agree with its contentions. It merely states that it disagrees with certain

[27] *See also* Application of Satellite Television Corporation for Authority to Construct an Experimental Direct Broadcast System, FCC 82–427, at 9–15 (released October 13, 1982).

concepts in the *Structure* order. This bare statement of disagreement is not sufficient to conform to the requirements of our Rules and Regulations. Section 1.429(c) of the Rules requires that the petition for reconsideration shall state with particularity the respects in which petitioner believes the action should be changed. WUI has not stated how it would want to have the *Structure* order changed to satisfy its concerns. In any event, we adhere to our earlier view that our required structural and operational safeguards are adequate. Therefore, we deny this aspect of WUI's request.

G. *Acceleration of the Commission's schedule for other matters*

44. WUI argues that the Commission should immediately grant its requests for: (1) "cost-based" access to INTELSAT space segment rates; (2) unbundled rates for INTELSAT space segment and earth station segment components; and (3) independent access and operational capability at U.S. INTELSAT earth stations. WUI contends that deferral of these matters will irreparably harm WUI through customers and revenues lost to Comsat and severely abridged operational flexibility at U.S. INTELSAT earth stations. Comsat states in its opposition that this complaint is wholly frivolous and does not warrant substantive response.

45. We find that WUI has presented no new facts or analysis to support our changing our prior findings in the *Authorized User* proceeding. 90 FCC 2d at 1432–35. See also *Communications Satellite Corporation*, *supra*, n.20. We have considered WUI's contentions of unfairness in paras. 29 and 30, *supra*, and have found that WUI will not be irreparably harmed from revenues lost by a policy allowing customers to provide their own arrangements in lieu of paying "middlemen" end-to-end carriers for their services. We also have fully addressed WUI's contentions in the *Authorized User* proceeding and have found that there is no direct connection between the policies we announced in that proceeding and our inquiries into potential changes in earth-station ownership and INTELSAT access policies. In general, by permitting Comsat to offer end-to-end services through a subsidary, we have established a mechanism to strengthen competition in the provision of communications services. This mechanism for strengthened competition is present regardless of the outcome of the earth-station ownership and INTELSAT access inquiries. The possibility that these inquiries may ultimately result in additional competition in a different market (e.g., provision of INTELSAT capacity) does not make resolution of these inquiries a prerequisite for the actions that we have taken in the *Authorized User* proceeding. In particular, as to the earth-station-ownership issue, we said that our current ownership policy does not prevent the carriers from competing with a Comsat subsidiary for end-to-end services. The ability to compete results from the requirement that ESOC make earth station facilities and services available to other

carriers on the same reasonable and non-discriminatory terms available to the Comsat subsidiary. As to the INTELSAT access issue, we similarly found that carriers would be able to compete with a Comsat subsidiary for end-to-end services adequately through their ability to obtain INTELSAT half circuits from Comsat at the same reasonable and non-discriminatory rates charged a Comsat subsidiary. Finally, as to the unbundling aspect, we found no reason to require immediate tariff unbundling of space and earth segment rates since we had not yet decided which entities may individually own earth stations or obtain direct access to INTELSAT. WUI presents no new facts or arguments here. We, therefore, affirm our findings in the *Authorized User* proceeding.

IV *Ordering Clauses*

46. ACCORDINGLY, IT IS ORDERED, that the Petitions for Reconsideration or Clarification filed by Western Union International, Inc. and RCA Global Communications, Inc. are DENIED, except as indicated in paragraph 33 herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

March 31, 1983

Separate Statement
of
Commissioner Anne P. Jones
Concurring and Dissenting in Part

In Re: Changes in the corporate structure and operation of the Communications Satellite Corporation (CC Docket No. 80–634)

When the Commission issued the Memorandum Opinion and Order for which reconsideration is sought here, I dissented because I was not convinced of the correctness of the Commission's position on two threshold points. I take this opportunity to state my position on those points and thereby explain my dissent.

First, I was and am not persuaded that it is the proper function of this Commission to bless Comsat's diversification into non-INTELSAT/INMARSAT business activities. As indicated in the Comsat Study, the Notice of Proposed Rulemaking in this proceeding, and the August MO&O, entry by Comsat into such activities involves substantial risk of behavior by Comsat detrimental to its competitors, its rate-payers, and its statutory INTELSAT/INMARSAT functions. In view of this risk, I believe the Commission was quite correct in suggesting in the Study and the Notice that Congress should address in further legislation the scope of Comsat's authority, if any, to engage in non-INTELSAT/INMARSAT activities.

My second concern relates to the Commission's decision to rely

entirely on structural safeguards and existing statutory filing requirements to monitor entry by Comsat into non-INTELSAT/INMARSAT activities. In this regard, it seems to me well arguable that repeated references in the Comsat Study and the Notice of Proposed Rulemaking to the possibility that particular proposed activities by Comsat might conflict with its INTELSAT/INMARSAT activities implied that the Commission would establish some monitoring mechanism to guard against such conflict. It is therefore also arguable that the Commission's decision not to establish *any* monitoring mechanism, but to rely instead entirely on structural safeguards and existing filing requirements, was not fairly within the scope of this rulemaking as required by notice and comment provisions of the Administrative Procedure Act (5 U.S.C. § 553).

I concur in the present Memorandum Opinion and Order insofar as it denies reconsideration of the structural and operational limitations imposed last August. In my judgment those limitations should be retained, despite my own doubts that they, or any other limitations within the power of this Commission to impose and enforce, will or can achieve their purpose.

I understand the argument reflected in paragraph 41 of this MO&O that entry by Comsat into diversified, unregulated, satellite-related activities may contribute to the overall development of satellite communications technology and thereby serve the public interest. But I am not persuaded by that argument.

For one thing, I am not convinced that whatever contribution ComSat's entry into unregulated activities may make to overall development of satellite communications technology could not or would not be made by others.* And even assuming *arguendo* that ComSat is uniquely able to make such contributions, it is not clear that the possibility of its doing so outweighs the dangers which the limitations imposed on it in this proceeding are intended to prevent. And finally, it seems to me that the unhappy history of this Commission's efforts to police the boundary between regulated and unregulated activities of communications common carriers strongly suggests that such efforts are expensive, frustrating, and frequently vain.

It is with some reluctance that I conclude that a company with ComSat's resources and energy should be confined to statutorily mandated, regulated activities. However, I am even more reluctant to approve the creation of yet another partly regulated, partly unregulated telecommunications company, with all the dangers and

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* As I noted in dissenting from the Commission's approval of ComSat's entry into the manufacturing and marketing of shipboard earth stations and into direct satellite broadcasting, there is no shortage of other entrants or would-be entrants into these businesses. See 90 F.C.C. 2d 505 and FCC 82–427 (released October 13, 1982)

regulatory problems such companies generate, without a much more convincing case for doing so than has in my judgment been made in this proceeding. I therefore again dissent from the basic decision to permit ComSat to engage in unregulated activities, regardless of the structure through which it does so.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON re: COMSAT STRUCTURE RECONSIDERATION

In the Comsat Structure and Authorized User decisions we have taken another step in establishing the framework for introducing additional competition in the provision of international telecommunications services. In the Comsat Structure decision we have followed the recommendations of our Comsat Study to require the separation of Comsat's monopoly (Intelsat/Inmarsat) services from its other activities. We have thus required the establishment of separate subsidiaries and the institution of appropriate accounting techniques to preclude Intelsat ratepayers from subsidizing non-Intelsat endeavors. In Authorized User we authorized Comsat to provide Intelsat capacity directly to users through its jurisdictional arm, the World Systems Division, and to provide end-to-end services through a separate subsidiary.

These and other decisions have permitted Comsat to enter new markets and to compete with other carriers. For example, Comsat may now directly compete with the international record carriers, Western Union, direct broadcast satellite providers and AT&T. Additionally, as in the Authorized User decision, we can modify the structure of a market so that all service providers will have an incentive to establish rates closer to cost. Yet Comsat remains a monopoly service provider of international earth station facilities and the Intelsat space segment. I anticipate, at least for reasons of equity, that the Commission will consider in the not too distant future the outstanding NOIs on earth station ownership and direct access. While considerations unique to international services and facilities must be recognized, the introduction of additional competition in the provision of international satellite services may provide the same public benefits that augmented competition has produced domestically, i.e., additional service offerings, greater efficiencies and lower rates.

Common Carrier, Specialized Services

Notice of Proposed Rulemaking adopted seeking public comment on whether the divested BOCs should be required to offer enhanced services or CPE through a separate subsidiary.
–Customer-Provided Equipment
CC Docket No. 83–115

FCC 83–71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies	CC Docket No. 83–115
North American Telecommunications Association	ENF- 83–5
Petition for Declaratory Ruling on the requirements for sale of customer premises equipment by the Bell Operating Companies	

NOTICE OF PROPOSED RULEMAKING

(Adopted: February 17, 1983; Released: March 4, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT.

I. *INTRODUCTION AND BACKGROUND*

1. We hereby give notice of a proposed rulemaking, pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, to determine whether and to what extent the structural separation conditions established in the Second Computer Inquiry (Computer II)[1] and the cellular communications systems proceedings[2] should be applicable to the Bell Operating Companies (BOCs) following their

[1] 77 FCC 2d 384 (*Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration*), *further recon.*, 88 FCC 2d 52 (1981), *aff'd sub nom.*, Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA*).

[2] Cellular Communications Systems, 86 FCC 2d 469 (1981), *recon.*, 89 FCC 2d 58, *recon.*, 90 FCC 2d 571 (1982), *appeal pending sub nom.* Millicom v. FCC, No. 81–1404 (D.C. Cir.).

divestiture from the American Telephone and Telegraph Company (AT&T) in accordance with the 1982 Consent Decree.[3] This proceeding will also treat the North American Telecommunications Association's (NATA's) Petition for Declaratory Ruling on the requirements for sale of customer premises equipment by the divested BOCs.

2. In Computer II, the Commission found that the provision of enhanced services and customer premises equipment (CPE) was not subject to regulation under Title II of the Communications Act of 1934, as amended, 47 U.S.C. §157, *et seq.* The Commission ordered communications common carriers to separate the offering of enhanced services and CPE from regulated communications offerings. The Computer II rules and policy prescribe two different sets of requirements for how carriers participate in the provision of CPE and enhanced services. AT&T is permitted to engage in these activities only through a separate subsidiary and subject to specific structural, accounting, and information flow requirements. Common carriers other than AT&T need not form separate subsidiaries but must maintain separate books of account for CPE and enhanced services. If these carriers use their own transmission capacity for their enhanced service offerings, they must obtain that capacity pursuant to the terms and conditions embodied in their tariffs.

3. AT&T has chosen to enter the unregulated CPE and enhanced services market through a single, national separate subsidiary, American Bell Inc. (AmBell). On June 10, 1982, the Commission approved AT&T's capitalization plan for AmBell's provision of enhanced services. *Memorandum Opinion and Order*, 90 FCC 2d 404. On November 4, 1982 and December 29, 1982, the Commission approved requests by AT&T to further capitalize AmBell to provide new CPE and Picturephone Meeting Service (PMS). *Memorandum Opinion and Order*, FCC 82–496, released November 10, 1982; *Memorandum Opinion and Order*, Mimeo No. 1600, released December 30, 1982. AmBell now provides new CPE and enhanced services on an unregulated basis. The BOCs currently provide local exchange, some toll services and embedded CPE. On January 21, 1983, AT&T requested the Commission to approve the capitalization of AmBell to accept the transfer of the BOCs' embedded CPE to be offered on an unregulated basis. We are currently reviewing that request.

4. On January 8, 1982, AT&T and the Department of Justice entered into a proposed consent agreement to settle the Department's antitrust action against AT&T. In an August 8, 1982 opinion (Opinion), the presiding judge conditioned his acceptance of the consent agreement on AT&T and the Department of Justice agreeing to several specific modifications. On August 24, 1982, the judge

[3] United States v. Western Electric, Civil Action No. 82–0192, slip op., released August 24, 1982 (D.D.C.).

entered the Consent decree incorporating the terms of the consent agreement and the court's modifications.

5. The Consent Decree requires the divestiture of AT&T's local exchange services.[4] This is to be accomplished by means of (1) the transfer from AT&T to the BOCs of sufficient facilities, personnel, systems and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications, exchange access and printed directory functions, (2) the separation within the BOCs of all facilities, personnel and books of account between those relating to local exchange exchange access, and printed directory functions and those relating to other functions and (3) the spin off to the shareholders of AT&T of the ownership of the separated portions of the BOCs providing local exchange, exchange access, and printed directory services.[5]

6. The Consent Decree permits the ownership of individual BOCs, after divestiture, to be consolidated into one or more companies. In addition, the BOCs may support and share the costs of an organization for the provision of engineering, administrative and other services on a centralized basis. The BOCs also shall provide through a centralized organization a single point of contact for BOC coordination to meet the requirements of national security and emergency preparedness. Until September 1, 1987, AT&T and its subsidiaries, Western Electric (Western) and the Bell Telephone Laboratories (BTL) shall provide on a priority basis all research, development, manufacturing and other support services to enable the BOCs to fulfill the requirements of the Consent Decree.

7. The divested BOCs are required to provide to interexchange carriers and information service providers[6] exchange and exchange access services on an unbundled, tariffed basis that is equal in type, quality and price to that provided AT&T. The BOCs shall not discriminate between AT&T and others in (1) the procurement of products and services, (2) establishment and dissemination of technical information and procurement and interconnection standards, (3) charges for or interconnection and use of BOC telecommunications service and facilities and (4) provision of new services or

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[4] The term "local exchange service" as used in the Consent Decree has a significantly different meaning than it does in traditional common carrier parlance, encompassing a much broader area of operations. The term LATA (local access and transpart area) is generally used in place of "exchange" for this reason.

[5] The Consent Decree does not require the divestiture of Cincinnatti Bell Inc. or Southern New England Telephone, in which AT&T holds minority interests. In a separate action also taken today, we are determining the applicability of the structural separation requirements to these two companies.

[6] An "information service" is the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications except that such service does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. Consent Decree, Section IV. J.

the planning of construction or modification of facilities for exchange access.

8. According to the January 8 consent agreement between the Department of Justice and AT&T, the BOCs were not to (1) provide interexchange telecommunications services or information services, (2) manufacture telecommunications products or customer premises equipment or (3) provide any other product or service except exchange telecommunications and exchange access service that is not a natural monopoly service actually regulated by tariff. The presiding judge's August 11 modifications, inter alia, eliminated the agreement's prohibition on marketing of CPE by the BOCs. AT&T, however, will retain embedded CPE and all related assets. In brief, the divested BOCs will provide local exchange communications and exchange access in a regulated environment and may provide CPE in the competitive market once embedded CPE is transferred from the BOCs. The court noted its expectation that the BOCs would secure CPE from a number of suppliers. *Opinion*, *supra*, at 112, note 249. Nevertheless, it was silent concerning the relationship of the BOCs to Western Electric in its role of CPE manufacturer and to AmBell, AT&T's domestic retailer of CPE.

9. According to AT&T's Plan of Reorganization filed with the District Court on December 16, 1982, and subject to the court's approval, seven regional holding companies will hold all of the stock of the BOCs and each BOC will be wholly owned by a regional holding company. The regional companies will be independent of one another and of AT&T. Stock in each of the regional holding companies will be distributed to AT&T shareholders in amounts proportionate to their ownership in AT&T. Regions will be geographically contiguous. Each region will offer service to approximately the same number of customers and include approximately the same value of assets, number of employees and network access lines as each of the other regions. *See* Appendix A. Each regional company will hold one share of voting common stock in a Central Staff organization and appoint one member of the Central Staff's board of directors. The Central Staff management will be under the direction of a chief executive officer selected by the board of directors.

10. The Central Staff will augment BOC capabilities with centralized resources necessary to offer exchange services. Initially, it will consist of more than 8800 employees and associated facilities, systems and rights to technical information. Among the assets to be transferred to the Central Staff are centrally developed AT&T computer systems, including network operations systems, procurement related systems, business information systems, other administrative systems and systems for solving technical or engineering management problems, including central office engineering maintenance, facility engineering, fundamental network planning and distribution of services planning.

11. In addition, AT&T will transfer to the Central Staff the personal and assets associated with functions and services relating to the procurement of network facilities which have been performed centrally for the BOCs by AT&T. It will also transfer to the Central Staff personnel and assets associated with other technical functions and services which the staff will perform on a centralized basis for all the regional companies. These functions and services include: (1) the planning, engineering and operation of network facilities; (2) the design of network configurations; (3) specification of performance standards and generic equipment standards; (4) research in communications technology; and (5) performance of central office engineering, records maintenance and installations.

12. In brief, it appears that the Central Staff will perform for each of the regional companies a broad range of functions pertaining to design and operation of exchange networks. Moreover, the Central Staff's board of directors will have the power to increase or reduce the Central Staff offering of services to the BOCs. The Plan of Reorganization appears to give the regional companies the latitude to allow the Central Staff to engage in CPE-related activities.

13. On November 30, 1982 NATA filed a Petition for Declaratory Ruling seeking a determination as to the structure under which the divested BOCs may offer CPE. NATA argues that after divestiture the BOCs will retain sufficient power that each independently would be able to "destroy" competition within its service region and thereby hinder competition nationally. NATA concludes that this power is so great that it can be properly limited only by conditioning the BOCs' participation in the provision of CPE with a separate subsidiary structure. As in NATA's petition, the principal issue in this proceeding is whether the Computer II structural separation requirements should apply to the divested BOCs. We discuss this matter below, and we invite public comments. In addition, we also seek comment on whether the structural separation requirements adopted pursuant to the cellular proceedings should apply to the divested BOCs. Finally, we invite comment on whether, if we determine to maintain some structural separation, the Computer II or cellular separation requirements should be modified to accommodate the BOCs' changed circumstances.

II. *DISCUSSION*

14. In Computer II we required that all carriers separate their provision of enhanced service and CPE from the common carrier offering of basic transmission capacity. While we imposed structural separation requirements only on AT&T, all carriers owning transmission facilities are governed by this requirement. Enhanced services and CPE may only be offered on a non-tariffed basis

separate from the carrier's tariffed offering of transparent basic transmission.[7]

15. The Consent Decree permits the BOCs to offer any services that fall within the definition of exchange telecommunications services but not information services.[8] It is not clear that the scope of "information service" is congruent in all respects with our Computer II definition of enhanced services.[9] The BOCs may be of the opinion that there are certain enhanced services that they could provide under Computer II which would not be barred under the Consent Decree.[10] This would appear to be the case if, for example, an enhanced service constituted a telecommunications service as defined by the Decree. The BOCs are requested to state whether they intend to offer enhanced services as that term is defined in our Computer II decisions. Interested parties are invited to file comments on what structural separation requirements, if any, should govern the divested BOCs' provision of enhanced services. If structural separation is not required, comments are sought on whether any other specific requirements should govern the BOCs' provision of enhanced services in addition to those general requirements currently applicable to all carriers.

16. Unlike enhanced service, it is clear that divested BOCs may compete in the provision of CPE. Accordingly, we seek comment on the structure under which the divested BOCs should be permitted to offer CPE consistent with Computer II.

17. In our Computer II decisions, we stated that the primary

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[7] To date we have only mandated the detariffing of new CPE. The manner and timing for the detariffing of embedded CPE is at issue in the *Implementation Proceeding*, 89 FCC 2d 694 (1982).

[8] Under Section IV(o) of the decree "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received by means of electromagnetic transmission, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission." *Also see* note 6, *supra*, for the Consent Decree's definition of "information service."

[9] Section 64.702(a) of the Commission's Rules and Regulation states the following:

> . . . the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

[10] *Compare* Response of the United States to Public Comments on Proposed Modification of Final Judgment, May 20, 1982 at 49-50 (Department of Justice states that the BOCs would not be able to provide Custom Calling Services II) *with* AT&T, 88 FCC 2d 1 (1981) (the Commission finds Custom Calling Services II to be an enhanced service).

benefits of structural separation are protection for the regulated ratepayer against cross-subsidy and protection for the general public against such anticompetitive activities as denial of network access and predatory pricing of unregulated offerings. *Final Decision* at 463. We recognized, however, that structural separation is not without its costs. These costs may include the capital costs of separation, economic inefficiencies, increased business risks and, for smaller carriers, more limited access to capital markets. *Id.* at 466. Because we did not wish to risk depriving the consumer of the benefit of a firm's entry into the competitive market, we chose to apply the separate subsidiary requirement only where essential to assure the objectives of the Act. *Reconsideration* at 72. We relied on four decisional factors in identifying the structural mechanism's applicability. They were:

> (a) a carrier's ability to engage in anticompetitive activity through control over "bottleneck" facilities, i.e., local exchange and toll transmission facilities, on a broad national geographic basis; (b) a carrier's ability to engage in cross-subsidization to the detriment of the communications rate payer; (c) the integrated nature of the carrier and affiliated entities, with special emphasis upon research and development and manufacturing capabilities that are used in conjunction with, or are support by, communications derived revenues; and (d) the carrier's possession of sufficient resources to enter the competitive market through a separate subsidiary.

Id. Below, we will discuss the above decisional factors with respect to the BOCs as a starting point for analysis of whether we will require a separate subsidiary structure for the BOCs.

18. *Control of Bottleneck Facilities.* We stated in the *Final Decision* at 468 that "the importance of the control of local facilities . . . cannot be overstated." With the passage of time, "the access bottleneck nature of the telephone local loop will take on greater significance." *Id.* Pursuant to the Consent Decree, each BOC will own substantial interexchange toll facilities within that company's post-divestiture service area, i.e., LATA. In addition, each BOC will be the dominant provider of exchange and exchange access service.

19. To warrant the application of a separate subsidiary requirement, control of bottleneck facilities must be on a "broad national geographic basis." *Reconsideration* at 72. Because the enhanced services and CPE markets are likely to be national in scope, a carrier is "unlikely to gain any significant competitive advantage by restricting the access of its competitors to a very limited network of underlying facilities." *Final Decision* at 468. Thus, a predicate for structural separation is sufficiently broad geographic control to permit effective anticompetitive practices. Table 1 indicates the service territories of each of the regional companies. In addition, the regional companies will perform, through their Central Staff, numerous network and central office functions including planning, design, engineering, operations, research and specification of standards. *See* para. 10–12, *supra.*

Table 1

Service Territories of the BOCs by Region*

Region	Population in BOCs' Service Territories	
	% of population of states in which BOCs are located	Number (millions)
Northeast	92	25
Mid-Atlantic	84	27
Southeast	70	30
Midwest	74	30
Southwest	76	21
Mountain and Great Plains	78	22
Far West	78	20

* Based on 1981 BOC configurations.
Source: Plan of Reorganization, pp. 456–60.
See generally Appendix A of this Notice.

20. Even if the divested BOCs were deemed to control bottleneck facilities on a broad national geographic basis, it is not clear that such control is sufficient to unfairly advantage the BOCs' untariffed, unbundled offering of CPE. First, the Commission's Part 68 registration program may provide ample assurance that independently produced CPE will obtain network interface equal to that of the carrier's products. Secondly, while carriers can manipulate the release of information concerning changes in network interface specifications, Computer II requires that information that would affect the manner in which CPE is connected to the network must be disclosed by all carriers owning basic transmission facilities to all interested persons on the same terms and conditions. *Final Decision* at 246; *Reconsideration* at 95. *See also* note 3, *supra*. These provisions apply regardless of whether the carrier is subject to separate subsidiary requirements.

21. *Ability to Cross-Subsidize.* Effective cross-subsidization of entry into the CPE market requires a large monopoly revenue base. *See Final Decision* at 468. Even if the BOCs' activities are limited to exchange and exchange access service, each of the divested BOCs will retain a monopoly revenue base. *See* Table 1, *supra*. Nevertheless, application of separate subsidiary requirements to the BOCs

would be unnecessary if accounting methods could prevent cross-subsidization. This is among the purposes of conventional rate and service tariffing and of the separate books of account that Computer II requires of independent telephone companies. The control of cross-subsidy by accounting techniques is aided by the fact that there are few common equipment costs in the CPE and local exchange businesses. Equipment costs, however, do not exhaust the possible commonalities of the two lines of business. Under the Plan of Reorganization, the BOCs have the opportunity to intermingle network-related and CPE-related costs of, as examples, marketing, installation, maintenance, research and development as well as the Central Staff's general administrative, management and other overhead costs.

22. *Integration of Operations.* The third factor in determining the applicability of the structural separation requirements is the extent of integration of the carrier's activities with the activities of non-carrier affiliates. *Reconsideration* at 72. In our Computer II decisions, we were also concerned about the opportunities for cross-subsidization present in research, development and manufacturing activities that are supported by ratepayer revenues.

23. The extent of this concern is reduced by the terms of the divestiture which prohibit the BOCs' manufacture of CPE and telecommunications equipment. Under the Consent Decree, the BOCs may not control or be affiliated with a manufacturing operation. The consequent need to rely on unrelated manufacturing entities will diminish the BOCs' opportunities for cross-subsidization of CPE with network equipment requirements. In addition, AT&T states that the BOCs will make their own procurement decisions as they have in the past. Plan of Reorganization at 374.[11] On the other hand, the Plan of Reorganization states that the Central Staff will participate in the product selection and purchasing process to the extent that the Staff will provide the regional companies with advice and assistance in the form of technical evaluations of products or services. *Plan of Reorganization* at 376. The Central Staff will also provide to the regional companies procurement support functions including purchased products engineering, quality assurance, advice on disposition of surplus, technical information resource management and training. *Id.* at 379. The extent of this centralized, procurement-related involvement in the purchase of network CPE may have an important impact on the independence of individual BOC procurement decisions.

24. Also, the BOCs will remain integrated to the extent that they will conduct telecommunications research and development on a centralized basis. There is no explicit bar to the BOCs' conduct of

[11] For a discussion of AT&T procurement practices, see *Report and Order and Notice of Inquiry, CC Docket No. 80–53,* FCC 80–699, released July 28, 1981.

CPE research and development on a similarly centralized basis. The BOCs' treatment of network R&D costs and CPE R&D costs, if any, cannot now be predicted.

25. *Resources*. In determining the extent of the separate subsidiary structure's applicability, we expressed concern that "the costs of separation are borne disproportionately by smaller companies due to indivisibilities. . . , and that these ". . . additional costs may foreclose entry into the enhanced service or CPE market for some carriers." *Reconsideration* at 74. Thus, we conclude that the disparity in size between AT&T and the independent telephone companies "leads to the result that the benefits of structural separation for AT&T are greater than the costs, while this calculus is reversed for the independent telephone companies." *Id.* As stated above, each of the regional companies is as small as as the largest of the independents, all of which were exempted from structural requirements.

III. *ISSUES FOR COMMENT*

26. We have noted various factors considered by this Commission in the course of Computer II. Other factors may be relevant in considering whether the divested BOCs should be subject to structural separation requirements. Accordingly, parties are invited to comment on any other factors deemed relevant for our consideration in reaching a final determination on this subject. In addition to the foregoing, we specifically seek comments on the following:

a) Wheter a divested BOC should be subject to a separate subsidiary requirement for the provision of enhanced services.

b) Whether a divested BOC should be subject to a separate subsidiary requirement for the provision of CPE.

c) Whether a divested BOC should be subject to a separate subsidiary requirement for the provision of cellular communications services.

d) If structural separation is required for the BOCs' provision of either enhanced services, CPE, or cellular communications services or all of these what separation requirements should govern the relationship between the subsidiary and affiliated entities in each case?

27. With the proceeding commenced today, we seek to determine whether, following divestiture, the structural separation requirements prescribed by Section 64.702 of the Commission's Rules should be applied to the Bell Operating Companies. Also, in the course of this proceeding, we will consider, if any structural changes are necessary, whether changes are required to accommodate distinctive characteristics of the divested BOCs' size, operations, structure, role in the communications industry, relationships among themselves or with any other affiliate including the Central Staff, their relationships with AT&T or any of its affiliates or subsidiaries, or any other pertinent characteristics that may or may not appear in the above

discussion. We invite members of the public to give the above matters their carefully considered comment.

IV. *REGULATORY FLEXIBILITY ACT CERTIFICATION*

28. Pursuant to Section 605(b) of the Regulatory Flexibility Act (RFA), we hereby certify that this proceeding does not address a "proposed or final rule" that will "have a significant economic impact on a substantial number of small entities." The pertinent definition of "small entity" is "small business" which has the same meaning as "small business concern" under Section 3 of the Small Business Act. That section defines a small business concern as "one which is independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632. At present, the BOCs are wholly owned facilities of the world's largest corporation. The divested BOCs will be wholly owned affiliates of regional companies, each one of which is in the top 30 of the Fortune 500. Each of the BOCs holds a legal monopoly for its authorized service area. Thus, a BOC is not a "small entity" within the meaning of Section 605(b) of the RFA.

29. In addition, no rules that may arise out of this proceeding will impose any regulatory requirements on, require any action by or cause any direct impacts on any entities other than the BOCs. Thus, because the rules that are the concern of this proceeding are being considered only for application to large entities, the BOCs, there is no danger of violating the RFA's purpose of assuring that "laws and regulations designed for application to large scale entities [are not] applied uniformly to small businesses." 5 U.S.C. § 601 note. To the extent this proceeding is designed to determine whether BOC operations are likely to be of a scale requiring structural separation, it shares with the Regulatory Flexibility Act the purpose of fit [ing] regulatory and informational requirements to the scale of the businesses . . . subject to regulation." *Id.*

V. EX PARTE CONTACT REQUIREMENTS

30. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contracts are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the time a Public Notice is issued stating a substantive disposition of the matter is to be considered at a forth coming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff that addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any

previously filed written comments for the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, and a copy must be provided to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.231.

31. Pursuant to applicable procedures set forth in § 1.415 of the Commission's rules, interested parties may file comments on or before April 4, 1983, and reply comments on or before May 4, 1983. All relevant and timely comments and reply comments will be considered by the Commission before further action in this proceeding. The Commission may also consider any other relevant information brought to its attention.

32. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a written summary indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order*. In accordance with the provision of § 1.419 of the Commission's Rules, an original and 5 copies of all comments, replies or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also desire that each Commissioner receive a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in this proceeding may do so by submitting one copy of their comments, without regard to form, provided that Common Carrier Docket No. 83–115 is specified in the heading. Such informal participants who desire that responsible members of the staff receive a personal copy may file an additional five copies. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room, Room 239, 1919 M Street, N. W. in Washington, D. C.

VII. *ORDERING CLAUSES*

33. Accordingly, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 203, 204, 205, 214, 220, 221 and 403 of the Communications Act of 1934, as amended, Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and Sections 1.411 *et seq.* of the Commission's Rules, 47 C.F.R. § § 1.411 *et seq.* there is HEREBY INSTITUTED a notice of proposed rulemaking concerning the matters described herein including those raised by the Petition for Declaratory Ruling filed November 30, 1982 by the North American Telecommunications Association. Members of the public

are notified that any policies that may be established in this proceeding may be embodied in the Rules and Regulations of the Commission.

34. IT IS FURTHER ORDERED, That all interested persons MAY FILE comments on the matters discussed herein on or before April 4, 1983. Reply comments shall be filed on or before May 4, 1983.

35. IT IS FURTHER ORDERED, That the Secretary shall cause this Notice of Inquiry and Proposed Rulemaking to be published in the Federal Register.

36. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Notice* to the Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.*) (1980).

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Policy and Rules Concerning the Furnishing of Customer Premises Equipment by the Bell Operating Companies

As I have frequently stated, the time has come to unshackle the Bell Operating Companies (BOCs).[1] On January 1, 1984 these companies will be divested from AT&T by the terms of the Modification of Final Judgment (MFJ) approved by Judge Greene.[2] Divestiture will completely change the environment in which the BOCs and the regional holding companies (RHCs) operate. In this new, competitive environment, the imposition of a separate subsidiary requirement on the BOCs makes no sense and would be contrary to the public interest. The soon-to-be divested BOCs already face the prospect of grievous restrictions mistakenly imposed on them in the MFJ. Any additional restrictions imposed by this Commission would only serve to compound this error.

In determining what, if any, regulatory structures are necessary in the post-divestiture telecommunications world, the Commission should be guided by the principle that all competition should be full and fair. In addition, we must recognize that if the quality of this country's basic telecommunications infrastructure is to remain high,

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[1] *See e.g.*, Statement of Commissioner Joseph R. Fogarty before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce (December 1, 1982); Memorandum from Commissioner Fogarty to the Commission, November 1, 1982 [Fogarty Memorandum].

[2] *See*, Modification of Final Judgment, *United States v. Western Electric Co.*, Civil Action No. 82–0192 (D.D.C., entered August 24, 1982).

it is crucial that the BOCs be able to provide new competitive services and customer premises equipment (CPE). To limit the operating companies to the provision of basic service and equipment by judicial fiat, or to unduly burden their offerings by overregulation, will deny to the American public the benefits of securing universal, high quality, low cost sophisticated services and equipment integrated into the local loop technology of the telephone exchange. Even worse, such restrictions will deny these benefits to Americans at a time when many foreign countries are striving to upgrade their telecommunications networks in exactly this fashion. The choice of whether to form a separate subsidiary should be left to the business judgment of the companies involved. No one will benefit if the BOCs are forced to start the game from twenty yards behind the goal line simply because they were once part of the Bell System.

As a first step, this Commission should make clear that the *Computer II* [3] separate subsidiary requirement does not apply to the divested BOCs. In a single stroke, the MFJ has changed the factual basis upon which the *Computer II* rules were imposed on AT&T and the BOCs, by virtue of the affiliation with AT&T. In fact, after divestiture, the separation requirement is not technically applicable to the BOCs.

It must be remembered that the Commission initially imposed the structural separation condition on AT&T because it perceived a substantial threat to the communications ratepayer and concluded that other regulatory tools would not suffice.[4] In doing so, we concluded that the relevant market was national in scope and that no significant competitive advantage could be gained based on a limited network of underlying facilities.[5] Under these circumstances, the Commission found that only AT&T had sufficient market power to engage in effective anticompetitive activity on a national scale and only AT&T possessed sufficient resources to enter the competitive market through a separate subsidiary. It focussed on AT&T's ability to engage in anticompetitive activities through control of "bottleneck" facilities, i.e. local exchange and toll transmission facilities, on a broad national geographic basis.[6] In addition, the Commission was concerned that AT&T's large CPE manufacturing operation combined with its market share and control over local facilities would provide the opportunity to engage in anticompetitive conduct in the equipment market.

On the other hand, the Commission found that the independent

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[3] *Second Computer Inquiry*, 77 FCC 2d 384 (1980) [Final Decision]; *reconsideration*, 84 FCC 2d 50 (1980); *further reconsideration*, 88 FCC 2d 512 (1981); *aff'd, sub. nom., Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[4] *Final Decision*, 77 FCC 2d at 386–388.

[5] *Final Decision*, 77 FCC 2d at 468.

[6] *Reconsideration Order*, 84 FCC 2d at 72.

telephone companies met none of these criteria and should not be subjected to the separate subsidiary requirements. It concluded that none of the independents had sufficient national market power to engage in anticompetitive conduct. Therefore, the argument that a separate subsidiary condition should be imposed because of these companies' "leverage to manipulate customer preferences" was rejected.[7] In particular, it found that companies such as United Telephone System, Inc. and Continental Telephone Corp. did not have the manufacturing base and toll facilities to engage in anticompetitive conduct,[8] and that GTE lacked the toll facilities and sufficiently large operating territories.[9]

As discussed in this Notice, none of the factors which caused the Commission to impose the separation requirement on AT&T is applicable to the divested BOCs. The BOCs will have neither national market power nor toll facilities. Therefore, they will not have the control of "bottleneck" facilities on the broad national basis that we found to be necessary to justify imposition of the separation requirement. Likewise, the BOCs will have no manufacturing capability and no established market with an embedded base. Since we have already rejected the notion that a separate subsidiary requirement should be imposed simply because of a local carrier's "leverage to manipulate customer preferences," there is no basis upon which to require that BOCs offer CPE or enhanced services through a separate subsidiary.[10]

To the extent that concerns exist about cross-subsidization of nonregulated CPE by regulated services, they can be taken care of without resorting to the drastic remedy of separation. In particular, we have required that the independents set up separate books of account for nonregulated CPE and are in the process of amending the Uniform System of Accounts to achieve this result.[11] This requirement would be applicable to the BOCs and there is no reason to expect that it will not be effective.

The FCC has failed the public interest once already. The Commission should have amended the *Computer II* rules to permit the BOCs to continue to provide new CPE after January 1, 1983 on a detariffed basis without the necessity of establishing a separate subsidiary.[12] As it is, under the *Computer II* rules, the BOCs are now precluded from providing new CPE. This is nonsensical given that immediately

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[7] *Reconsideration Order*, 84 FCC 2d at 73–74.

[8] *Final Decision*, 77 FCC 2d at 467, 473.

[9] *Reconsideration Order*, 84 FCC 2d at 73.

[10] I am very pleased that the Commission has already come to this conclusion in the case of Cincinnati Bell, Inc. and the Southern New England Telephone Company. *Cincinnati Bell, Inc.*, et. al., ___ FCC 2d ___ (1983).

[11] *See* Notice of Proposed Rulemaking, Amendment of Parts 34 and 35, ___ FCC 2d ___ (1982).

[12] *See* Fogarty Memorandum at 3–4.

after divestiture they will be permitted to reenter the market. Barring the BOCs from the new CPE market for this time period can only serve to discourage them from entering the market at all because of the even higher start-up costs occasioned by the one-year prohibition. At the least, unfortunately, this delay gives all competitors a one year headstart on the BOCs. Further, this restriction has the practical effect of inhibiting competition by non-Western Electric equipment suppliers contrary to the intention of the Commission. To the extent that a potential conflict existed with the MFJ, I cannot imagine that that decision intended to place the BOCs in a position in which competition with AT&T would be impossible. In any event, this question should have been confronted head on by this Commission.

Even though the matter is out of the hands of the Commission, the MFJ is not sacrosanct. While I support the decision to permit the BOCs to offer CPE and Yellow Pages, I strongly object to prohibiting the BOCs from offering information services and to the bar on AT&T's offering of electronic publishing services for seven years. These judicial restrictions are no more in the public interest than an FCC-imposed BOC separation requirement would be. Instead of taking such an inflexible approach, the wiser course for the court would have been to rely on remedies such as strict accounting and tariff regulation. At least the *Computer II* waiver standard provides more flexibility[13] than does the strict showing required under the MFJ.[14]

The restrictions imposed on the divested companies by the MFJ raise serious and fundamental questions concerning the continued adequacy of basic research and development by the BOCs. I believe that the prospect for continued progress in local exchange technology and services is dim. If the regional companies are restricted to the limited market for exchange and access facilities, new CPE and Yellow Pages, it is doubtful that they will be in a financial position to support any significant research in local loop technology. Given the increased pressures on state regulators to keep basic local exchange rates low, it seems to me all too likely that capital for such research and development will not be forthcoming. Moreover, the prohibition on operating company marketing of new services may make the local operating companies hesitant or reluctant to experiment with more advanced switching and equipment designs. This result would be in sharp conflict with the public interest.

While innovation will not cease as a consequence of the Decree's restrictions, the operating companies may no longer lead the world in telephony and allied fields. I think it is a likely result that in

[13] *Reconsideration Order*, 84 FCC 2d at 57–58.

[14] *MFJ*, ___ F. Supp. ___ at 116–117.

many instances new telecommunications technology and services will be introduced more quickly and effectively in other countries than here in the United States. The implications for the competitiveness of U. S. industry in world telecommunications markets are no less troublesome.

This concern about the MFJ's undue restrictions on telecommunications activity is not limited to the BOCs. My concern goes as well as to AT&T Long Lines and ABI. I believe that the seven year restriction on ABI's provision of electronic services is not in the public interest. Such a limitation can only serve to restrict American technological development. I note that AT&T is already one of the leading proponents of videotext. I see no First Amendment conflicts here. I believe that the public will benefit only if all telecommunications service providers are permitted to participate in the information services market from the outset.

The solution is clear to me. Upon divestiture, or even before, AT&T and the RHCs, or the RHCs alone, with full FCC support should petition the District Court to remove these onerous restrictions. For the sake of the American ratepayer and in order to maintain the supremacy of telephony in this Nation, it is essential that the BOCs remain viable. To ensure viability, it is crucial that the BOCs be unshackled. This Commission and the court hold the keys to the lock. These keys should be used to set the BOCs free.

Agreement, Formal
Common Carrier, Interconnection, Carrier to Carrier
Common Carrier, Interconnection, Specialized Carrier
Common Carrier, Specialized Services
Message Telecommunications Services
Wide Area Telephone Service (WATS)

Petitions for reconsideration on the issues of retroactive adjustment of ENFIA rates paid during period of suspension and investigation of proposed revisions to BSOC 8 and use of frozen Phase I rates during Phase II denied. Petition for reconsideration on calculation of off-peak discount to OCC minutes granted in part.
–Exchange Network Facilities
CC Docket No. 78–371

FCC 83–125

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
American Telephone and Telegraph Company and the Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8)	Transmittal No. 53
Exchange Network Facilities for Interstate Access (ENFIA)	CC Docket No. 78–371

ORDER ON RECONSIDERATION

(Adopted March 31, 1983; Released April 5, 1983)

BY THE COMMISSION: COMMISSIONERS QUELLO, JONES & SHARP CONCURRING IN THE RESULT; COMMISSIONER FOGARTY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER DAWSON CONCURRING AND ISSUING A STATEMENT.

1. We have before us several petitions for reconsideration of our *Memorandum Opinion and Order* FCC 82–431, 91 FCC 2d 1079, 1982, *review pending sub nom., MCI Telecommunications Corp. v. FCC*, D.C. Cir. Nos. 82–1553, *et al.* (appeals consolidated Nov. 8 and Dec. 8, 1982) (*MO&O*), in which we concluded an investigation into proposed increases to the American Telephone and Telegraph Company

(AT&T) and Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8) governing charges for exchange network facilities for interstate access (ENFIA). In the *MO&O*, we determined the proper method of calculating other common carrier (OCC) billed minutes of use and the cost per minute of OCC use of exchange facilities (SEP Amount). We ordered AT&T to file tariff revisions using a billed minutes factor no higher than 4474, a SEP Amount no higher than $.0595, and an overall rate for Elements 2 and 3 of the ENFIA charge no higher than $183.46. We also directed the OCCs to remit to AT&T the difference between this rate and the interim billing and collection rate of $178.46 that had been in effect for the five month suspension and investigation period.

2. On October 15, 1982, AT&T filed a Petition for Expedited Reconsideration of our September 29, 1982 *MO&O*, arguing that the Commission erred in its calculation of an off-peak adjustment to OCC billed minutes of use.[1] This petition has been opposed by Southern Pacific Communications Company (SPCC), United States Transmission Systems, Inc. (USTS), and MCI Telecommunications Corporation (MCI). Separate petitions for reconsideration were filed on October 29, 1982, by Satellite Business Systems (SBS), USTS and SPCC. USTS and SPCC request that the Commission rescind that portion of the *MO&O* requiring the OCCs to remit to AT&T a retroactive adjustment in the ENFIA rate.[2] SBS asks that the Commission revise the *MO&O* to preserve the ENFIA rate in effect prior to the investigation so as to avoid inimical consequences for non-signatories to the ENFIA Agreement. AT&T has opposed these petitions. For the reasons explained below, we deny the petitions by SBS, USTS and SPCC, and grant AT&T's petition to the extent that an upward adjustment is made in the SPCC and USTS billed minutes. On our own motion, we make certain other adjustments to the minutes of each of the OCCs, resulting in a net increase in the weighted average of OCC minutes of use per ENFIA per month from 4474 to 4555 and in the combined ENFIA charge for Rate Elements 2 and 3 from $183.46 to $186.72.

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[1] In a petition for review of our September 29, 1982 MO&O filed with the U.S. Court of Appeals for the District of Columbia Circuit on October 5, 1982, AT&T has maintained that the Commission erred as a matter of law both in granting an off-peak adjustment to OCC minutes and in freezing the SEP Amount at $.0595 rather than directing the use in Phase II of Bell System Interstate Jointly Used Subscriber Plant Costs for July 1980-June 1981 for Level D rates and June 1981-June 1982 for Level E rates. AT&T does not specifically raise these issues here and presents to us for reconsideration only the matter of the proper calculation of the off-peak discount.

[2] In its petition for reconsideration, SPCC also argues that the adjustments to gross OCC minutes of use approved by the Commission should be applied consistently to the minutes of all reporting carriers. This argument is repeated in SPCC's opposition to AT&T's petition and will be addressed in that context.

I. *Background*

3. The ENFIA tariff governs the charges OCCs must pay for connections to local exchange facilities in the provision of end-to-end MTS/WATS-type services.[3] The tariff, which implements an Interim Settlement Agreement signed by AT&T, GTE and several OCCs,[4] was approved by the Commission on April 16, 1979, *ENFIA*, 71 FCC 2d 440 (1979), and was extended by the Commission on April 14, 1982, for a Phase II period to last for a maximum of two years. *Extension of ENFIA Agreement*, 90 FCC 2d 6 (1982) (*Extension Order*).

4. The agreement and implementing tariff have been designed to provide an interim formula for the computation of OCC access charges pending the establishment of a more permanent, cost-based access charge system.[5] In order to accomplish this, the tariff sets forth three rate elements. Charges for Element 1, the line between an OCC switch and the local exchange or Class 5 switch, are incorporated by reference from other Bell Operating Company tariffs. Charges for Element 2, Local Switching and Trunking, and Element 3, Use of Jointly Used Subscriber Plant, are computed through reference to formulas that are designed to simulate a charge for MTS or WATS use of such facilities. The use of these formulas in the computation of Level D rates, the ENFIA rates to be in effect from May 2, 1982 through April 15, 1983,[6] required the assignment of values to two variables: (1) the weighted average monthly OCC billed minutes of use per ENFIA line, and (2) the cost of non-traffic sensitive exchange plant per minute, as identified through the

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[3] The particular connections governed by BSOC 8, also known as ENFIA A, are those provided for Execunet or SPRINT-type services through line side terminations with a Class 5 switch. ENFIA does not apply to services that are connected with exchange facilities at only one end, *e.g.*, foreign exchange (FX) and common control switching arrangements (CCSA) with off-network access lines (ONALS). ENFIA, 71 FCC 2d 440, 450.

[4] The signatories to the original agreement are AT&T, MCI, SPCC, USTS, GTE, United States Independent Telephone Association (USITA), National Telephone Cooperative Association (NTCA), and Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO).

[5] On December 22, 1982, the Commission adopted an access charge plan in CC Docket No. 78–72, MTS and WATS Market Structure, FCC 82–579, released February 28, 1983, *review pending sub nom.* NARUC v. FCC, D.C. Cir. No. 83–1225 (filed March 1, 1983). Access charge tariffs implementing this plan, which by the terms of BSOC 8 will supersede the ENFIA tariff, are to be filed by October 3, 1983 so as to be effective on January 1, 1984.

[6] The ENFIA tariff provides for the periodic revision of ENFIA rates to reflect changes in certain factors in the formulas. The different rate levels are separately identified by letter. Rate levels A, B and C were effective prior to May 2, 1982. Rate levels D and E are effective for the first and second years of Phase II respectively.

jurisdictional cost separations process, for Bell System interstate MTS and WATS (SEP Amount).[7]

5. On April 16, 1982, following the release of the *Extension Order*, AT&T filed its Transmittal No. 53 proposing revisions to the ENFIA tariff. The revisions were based on an increase in OCC billed minutes from 3000 to 5823 and in the SEP Amount from $.0595 to $.0658 per minute. This would have increased Element 2 rates from $22.55 to $44.31 and Element 3 rates from $99.65 to $213.90 per month. SPCC, USTS, MCI, Western Union and SBS filed petitions to reject and U.S. Telephone Communications, Inc. (U.S. Tel.) filed a petition to reject or suspend, objecting to, *inter alia*, AT&T's calculation of OCC billed minutes and the SEP Amount. We did not agree with the OCCs that the tariff should be rejected, nor did we believe that the ENFIA agreement gave either the OCCs or AT&T the right to determine unilaterally the number of OCC billed minutes to be used in calculating the ENFIA rate.[8] Therefore, we were confronted with the necessity of determining the proper calculation of OCC billed minutes and AT&T's SEP Amount. During Phase I of the ENFIA tariff, the parties had been able to agree upon an acceptable billed minutes figure and SEP Amount. Thus, the disputes between the parties concerning the rates for the first year of Phase II raised, for the first time, substantial issues concerning the proper calculation of these factors according to the terms of the agreement. In order to resolve these issues, we suspended the effectiveness of the tariff for the full statutory period of five months and instituted an investigation into the calculation of billed minutes and the SEP Amount. We also established an interim billing and collection rate, subject to adjustment, based on 4000 billed minutes, a figure approximately halfway between the 2417 minutes reported by the OCCs and the 5823 minutes filed by AT&T, and AT&T's proposed SEP Amount of $.0658.[9] *ENFIA*, 90 FCC 2d 202 (1982) (*Designation Order*).

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[7] An additional variable affecting Element 3 rates is Factor P, or the percentage of the simulated MTS/WATS charge applicable to OCC ENFIA connections. In the Extension Order, we set Factor P at 55% for the duration of Phase II of the ENFIA tariff.

[8] In the absence of OCC December reports of 1981 billed minutes, AT&T had initially calculated the number of minutes as 6950 based on its measurements of holding time. The OCC reports were subsequently filed on March 19, 1982, at the direction of the Chief, Common Carrier Bureau, and resulted in a weighted average of 2417 OCC billed minutes. AT&T then argued that the OCC reports seriously understated the proper minutes. By making certain adjustments to the OCC reports, AT&T arrived at the 5823 figure presented in its tariff filing. *See* ENFIA, 90 FCC 2d 202, 206 (1982).

[9] This SEP Amount was chosen for the purposes of an interim billing and collection rate because it resulted in a smaller and less controversial increase over the previous rate than the proposed increase in billed minutes. Designation Order, 90 FCC 2d at 216.

6. In conducting our investigation, we maintained two major objectives. First, in resolving conflicting interpretations of terms of the ENFIA agreement, we attempted to give effect to the intent of the parties. The ENFIA agreement was entered into to provide a "rough justice" compromise between the local business rate which the OCCs had been paying and rates based upon the full separations-based cost of exchange access assigned to the interstate jurisdiction. The agreement served as a temporary means of achieving a fair balance between the divergent interests of the parties pending the development of cost based access charges. Since the institutionalization of such access charges is still in the future, the purpose of the ENFIA agreement is the same now as when it was first devised, and requires that the rate established according to the terms of the tariff reflect a reasonable middle ground between the interests of the parties. Second, in view of our public interest responsibilities, we were obliged to resolve the parties' conflicts in a way that did not "fatally curtail" competition in interstate MTS/WATS-type services [10] before the substantial changes occasioned by a shift to access charges and the divestiture of the Bell Operating Companies are put in place.[11] We found that, in order to establish a rate that satisfied these objectives, certain adjustments to the billed minutes and SEP Amount figures provided by the parties were required.

7. The OCCs had proposed numerous adjustments to their raw billed minutes of use, many of which were not contested by AT&T. We accepted these uncontested adjustments while disallowing most of the other proposed exclusions and discounts, including adjustments to the ENFIA line count.[12] One further adjustment made to the billed minute count, which is the subject of AT&T's petition, was the discount for OCC off-peak minutes. Although off-peak minutes were never explicitly addressed in the original negotiations, we found no basis in the agreement for accepting MCI's proposal to completely exclude all non-business day and non-business hour

[10] MO&O, at para. 21.

[11] *See* Modification of Final Judgment, United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 51 U.S.L.W. 3628 (U.S. March 1, 1983)

[12] The uncontested adjustments allowed were exclusions of Texas intrastate minutes, usage of ENFIA-type facilities obtained from independent telephone companies, and intracompany, administrative traffic including testing, counting of OCC WATS-type services and usage of resold MTS and WATS at one end as one minute of use per billed minute, adjustments to compensate for rounding for billing purposes, and deductions for OCC billing adjustments and collectibles. The disallowed adjustments included the single rather than double counting of each billed minute of a call that transits an ENFIA line at each end, exclusion of all SPRINT LTD. minutes (an SPCC limited hour long distance service), MCI's proposal to exclude all non-business day and non-business hour minutes, normalization of study period days per month, use of a seven day study factor, minimum billing adjustments, billing lag adjustments and reductions in ENFIA line counts to reflect intrastate usage, delayed deliveries and trouble reports.

minutes or for SPCC's proposal to exclude all minutes generated by its SPRINT LTD. service. However, we did find considerable ambiguity in the term "billed minutes" and sufficient changes in market characteristics since the agreement was first entered into to deem it necessary to examine the intent of the parties in determining the proper application of the agreement to off-peak minutes. When the parties formulated and signed the agreement the OCCs exclusively offered business services and for nearly the entire duration of Phase I the negotiated figure of 3000 minutes was used in the formula despite the continued growth of total OCC minutes and OCC expansion into residential and off-peak services. Therefore, we found that the conduct of the parties was consistent with some form of off-peak adjustment. The basic purpose of the agreement is to provide for reasonable OCC compensation to telephone companies that parallels what local carriers receive through the separations and division of revenues/settlements process. Because the size of the interstate revenue pool is affected by AT&T's MTS/WATS rate structure including off-peak discounts, we found that an OCC ENFIA off-peak discount, patterned after the one contained in AT&T's MTS/WATS rate structures, would be consonant with the original intentions of the parties. It was not possible to calculate an actual off-peak discount because the per line charges paid under the ENFIA tariff are not structured to vary by time of day. In order to reasonably reflect such a discount in the per line charges we adopted a proposal made by SPCC and USTS to apply discounts similar to those used by AT&T in its rate structure for off-peak usage of MTS and WATS (40 percent discount for evening and 60 percent for night and weekend calls) to the off-peak minutes reported by the OCCs. Therefore, each OCC's traffic during the evening period was discounted by a .40 factor and the traffic during night and weekend periods was discounted by a .60 factor. These discounts resulted in a weighted average of the billed minutes per line per month of 4474.

8. In examining AT&T's SEP Amount calculations and the OCC's objections to them, we found that AT&T had properly derived the $.0658 figure by dividing Bell System interstate jointly used subscriber plant annual costs by Bell System annual interstate MTS and WATS conversation minutes of use. We also found that none of the adjustments proposed by SPCC and USTS, many of which were related to their argument that plant investment inaccessible by the OCCs should be excluded from the calculation of representative Bell System costs for jointly used subscriber plant, were consistent with the calculation method for the SEP Amount contemplated in the agreement and tariff.[13] However, we determined that our recent

[13] The SPCC and USTS proposed adjustments to the SEP Amount included removal of costs of plant inaccessible by the OCCs, removal of the 1.01 point of measurement timing factor, reduction of annual cost factors, revisions of the conversation time factor, removal of a portion of General Services and License

action to limit the growth of interstate allocations of non-traffic sensitive (NTS) costs by freezing the subscriber plant factor (SPF) at 1981 annual average levels, *Amendment of Part 67*, 89 FCC 2d 1 (1982) *recon. denied*, FCC 82–492, released November 8, 1982, *review pending sub nom. MCI Telecommunications Corp. v. FCC*, D.C. Cir. No. 82–1237 (filed March 4, 1982), should be reflected in the payments for exchange access made by the OCCs. As we noted in our discussion of the SEP Amount in Appendix C to the *MO&O*, the possibility of a cap of the SEP Amount clearly was contemplated by the parties to the ENFIA Agreement.[14] Therefore, we found that freezing the SEP Amount through Phase II was an acceptable method of applying the SPF freeze to the OCCs. The application of the $.0595 SEP Amount and the billed minutes figure of 4474 to the formalas for Level D rates yielded an Element 2 charge of $34.85, an Element 3 charge of $148.61 and an overall ENFIA rate for the two elements of $183.46 per line per month. We directed AT&T to file a replacement transmittal in conformance with these findings and, in accordance with the provisions of the *Designation Order*, we ordered the OCCs to remit to AT&T the difference between this rate and the interim billing and collection rate for the five month investigation period.

II. *AT&T Petition*

9. In its petition, AT&T argues that the off-peak discount applied to OCC minutes is erroneously calculated. Specifically, AT&T claims that the uncontested adjustments already include peak and off-peak minutes, and that the additional discounts for off-peak minutes result in duplicate deductions. In other words, AT&T asserts that the uncontested adjustments yield a net figure for OCC minutes and that the off-peak discounts subtracted from the net figure on Table 3 of the *MO&O* are improperly calculated as a percentage of gross minutes. This leads to a double counting of off-peak minutes, such as Texas intrastate minutes, already excluded through the other allowed adjustments. AT&T proposes a correction for this "miscalculation" which requires the reduction of each OCC's deductible off-peak minutes by the aggregate percentage of all of its uncontested adjustments. For example, since the uncontested adjustments resulted in a 17 percent reduction in MCI's gross minutes, 17 percent of MCI's off-peak deduction would be considered duplicative, and would be disallowed. Similarly, 22.3 percent of SPCC's and 34.2 percent of USTS' off-peak deductions would be disallowed. As a result of this

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Contract Expenses, and use of the illustrative Alabama State rate of return in lieu of AT&T's interstate rate of return. A discussion of these proposals is set forth as Appendix C to the September 29, 1982 MO&O.

[14] The agreement states that "it is anticipated that unless capped, this amount will increase each year, and that any change in this amount will be reflected in the tariff charges to be filed each year. . . ." ENFIA Agreement, para. 10, n. **.

correction, the monthly average billed minutes of use would increase to 180,036,858 for MCI, 72,005,679 for SPCC and 16,407,384 for USTS. The new weighted average of OCC minutes per ENFIA per month would be 4764, and would yield a rate of $36.88 for Element 2, $158.24 for Element 3, or $195.12 overall.

A. MCI

10. MCI argues that its off-peak adjustment is not double counted. MCI maintains that its initial report of minutes, filed on May 25, 1982, reflects sequential deductions from gross minutes. The off-peak deduction, taken after other adjustments had been made, was computed from a net figure that does not include minutes already subtracted. Neither its original reported deduction of 349,946,350 minutes for non-business and non-business day traffic nor its revised report of 74,564,131 deductible evening and 81,948,073 deductible night minutes[15] includes minutes that had already been excluded for intrastate Texas traffic, resold MTS and WATS, normalization, and billing adjustments. Therefore no adjustment need now be made.

11. Beyond its dispute of AT&T's proposed modification of MCI's off-peak adjustment, MCI advocates that, in light of the Commission's approved methodology, some of its other approved adjustments should be recalculated. These changes would decrease MCI's average minutes per ENFIA. In particular, MCI argues that our disallowance of the normalization adjustment effectively increases the net minute base upon which the off-peak adjustment should be calculated, and that the number of its deductible off-peak minutes should now be revised to 76,231,274 for evening and 83,783,040 for night. Similarly, since its original calculation of the billing adjustment was also affected by the normalization adjustment, the disallowance of normalization should result in an increase of the billing adjustment from 71,034,857 to 72,507,803 minutes. Further, MCI observes that the OCCs did not have the benefit of the Commission's decision prescribing the proper methodology for calculating billed minutes before their filings were made, and that as a result the numbers prepared by each of the OCCs on the basis of their individual theories are not necessarily consistent with each other or with the application of the theory adopted by the Commission. MCI advocates that it now be allowed to reform its calculations to include certain adjustments, specifically 33,238,742 minutes for rounding and 8,079,924 minutes for independent telephone company ENFIA, which were permitted under the approved methodology but had not previously been claimed by MCI. The inclusion of these new

[15] *See* Letter of September 16, 1982 from William J. Byrnes to Chief, Common Carrier Bureau and MO&O, Appendix B, Table 4.

adjustments, along with the revised off-peak and billing adjustments would reduce MCI's average minutes per ENFIA to 5036.

12. AT&T contests MCI's arguments regarding the computation of its off-peak exclusion but offers no persuasive evidence that MCI's minutes are not the result of sequential deductions or that they are otherwise understated. AT&T argues that MCI has never before made mention of its sequential deduction methodology, even though the *Designation Order* directed the OCCs to explain the techniques used to quantify proposed deductions. AT&T also notes that none of the OCCs challenged its restatement of the proposed adjustments in Appendix B to its June 21, 1982 comments in which each claimed OCC deduction was shown as a percentage change in gross minutes. AT&T implies that such "knowing acquiescence" to the percentage of gross minutes summary should be accorded greater weight as evidence of a methodology than any present OCC descriptions of sequential deductions. We find this unpersuasive. First, although in its initial filing on May 25, 1982 MCI did not specifically state that a sequential methodology had been used for every deduction claimed, in at least one instance, deletion of resold MTS and WATS minutes, MCI indicated that a net deduction was taken from a net figure.[16] In view of the fact that MCI's description of its methodology was generally sparse, it is not surprising that reference to sequential net deductions was not made more than once. Moreover, a sequential technique for calculating deductions is not inconsistent with AT&T's percentage summary. AT&T correctly calculated the percentage of total gross minutes for each deduction, leaving the OCCs no grounds for objection. The mere fact that these percentages are correct does not establish that the deductions were originally calculated as percentages of gross minutes, only that the numbers resulting from the methodology actually used bear the relation to gross minutes that AT&T has described. Finally, AT&T observes that the September 13, 1982 letter from the Chief of the Common Carrier Bureau directed MCI to submit figures for deductible evening and night minutes derived from percentages of total traffic and that, in its September 14, 1982 response, MCI related the reported off-peak discount to total minutes as a percentage. Again, the description of the deduction as a percentage of total minutes evidences nothing more than a mathematical identity and is not *a priori* proof of a particular methodology. In addition, it is clear from MCI's September 16, 1982 letter to the Bureau Chief that the revised off-peak deduction was derived directly from the original non-business and non-business day proposed deduction of 349,946,350 minutes, which MCI asserts was computed from a net figure.

13. In the absence of clear evidence to the contrary, we find it reasonable to conclude that MCI's off-peak minutes were properly

[16] MCI Initial Comments, May 25, 1982, p. 20.

derived from net as opposed to gross minutes and perceive no need to accept AT&T's adjustments to these minutes to correct for double counting. However, we also recognize that our disallowance of the exclusion for normalization changes the net figure upon which the billing adjustment and off-peak deduction should be based, and that, without recalculation, these adjustments are slightly understated. This results from the fact that, in the sequence used by MCI, the normalization exclusion preceded the original billing and off-peak adjustments and that, as a result of our disallowance of normalization, the number of net minutes from which these adjustments should be calculated is larger than MCI had contemplated. Since MCI could not have foreseen the Commission's ultimate decision on the permissibility of each proposed adjustment and therefore had no way of knowing the proper net figures upon which the off-peak discount must be based, we accept MCI's revisions to its billing adjustment and off-peak discount.

14. However, we agree with AT&T that MCI's proposal to revise its total minutes to reflect deductions for rounding and independent telephone company ENFIA should not be considered here. In accordance with Section 405 of the Act, 47 U.S.C. § 405 and Section 1.106(c) of our Rules, 47 U.S.C. § 1.106(c), on reconsideration we will examine only those matters raised by the parties that either involve new facts that were unknown to the parties at the time they filed their pleadings or represent compelling public interest concerns. Although MCI did not know which adjustments would be allowed or disallowed, it was fully aware that other parties had claimed exclusions that it had not, and was given ample opportunity to place into the record of this proceeding data which would permit the same exclusions to be made from its gross minutes as those allowed for SPCC and USTS.[17] MCI has not demonstrated why the public interest requires that we accept these revisions at this time when there were several other occasions when modifications to MCI's filed numbers more properly would have been made. We believe that any public interest that would be served by allowing these revisions is outweighed by the benefits of adhering to an administrative practice that encourages parties to place their best foot forward during the established pleading cycle so that other parties and the Commission can refer to a full record before a final decision is reached. In resolving the disputes over the calculation of billed minutes, we were not obligated under the ENFIA agreement to impute adjustments that had not been claimed by some of the OCCs even though we allowed such exclusions for other parties. Indeed, we could not fairly do so. If we permitted such adjustments for some parties now, on the

[17] After the initial comments of the OCCs were filed on May 25, 1982 all of the parties were given two additional opportunities, on June 21 and July 1, 1982, to comment on the other parties' pleadings and modify or reinforce their own.

basis of newly filed information, we would prejudice the interests of other parties that have not attempted such second-thought revisions to their positions. This would invite further efforts to reopen a record that, in accordance with accepted procedures, has now been closed. For these reasons, we reject MCI's proposed rounding and independent telephone company ENFIA adjustments, and recalculate MCI's average minutes as 5482 per line per month.[18]

B. SPCC

15. SPCC also challenges AT&T's contentions that the Commission erred in its calculation of the off-peak deduction. However, SPCC does not claim that it made sequential deductions similar to MCI's. Rather, SPCC argues that since it derived its billed minutes from revenue figures which include off-peak discounted revenues, its methodology "inherently" produces adjustments that reflect an off-peak discount. Thus, SPCC asserts that its various adjustments are already smaller than they would have been absent consideration of off-peak characteristics.[19] Therefore, SPCC denies that there is any double deduction for off-peak minutes. SPCC reiterates its previously expressed concerns that AT&T's conversion of SPCC's revenue factors to percentage adjustments of gross minutes is an inappropriate modification of its basic methodology and leads to a misinterpretation of the results.

16. AT&T maintains that SPCC's revenue based methodology for calculating billed minutes does not result in a reflection of the off-peak adjustment because the fact that the revenues included in the numerator of SPCC's formula are reduced through off-peak discounts is "neutralized" by a corresponding reduction in the average revenue per minute in the denominator. Thus, according to AT&T, SPCC's revenue-based methodology does not produce "inherently reduced" exclusions that are automatically adjusted for an off-peak discount and some of SPCC's off-peak minutes are therefore improperly deducted twice. AT&T recommends that, in order to correct for this defect, SPCC's allowed off-peak adjustment of 80,050,863 minutes be reduced by 22.3 percent, the aggregate percentage of the allowed adjustments other than the off-peak deduction. This would result in a corrected off-peak discount of 62,199,521 minutes and a total monthly average of 72,005,679 minutes.[20]

[18] *See* Appendix, Table 2, *infra.*

[19] SPCC's general formula for the derivation of minutes from revenues is as follows:

$$\frac{\text{Revenue}}{\text{Average Revenues Per Minute}} = \text{Minutes.}$$

[20] AT&T Petition, October 19, 1982, p. 6. Under its alternative methodology, set forth in Attachment I of its Petition, AT&T would subtract the approved off-peak deduction from gross minutes, leaving a net figure of 278,056,297 minutes from

17. We are not convinced that, in the calculation of other adjustments, SPCCs' revenue formula automatically compensates for the off-peak discount. It is difficult to trace the impact of SPCC's use of discounted revenues in both the numerator and denominator since each element of the formula, as calculated in SPCC's Initial Report, is adjusted for separate factors.[21] It is not clear that, even if all of SPCC's proposed revenue factors were allowed, either the "inherent reduction" effect claimed by SPCC or the "neutralization" effect claimed by AT&T would result from the formula. However, it is not necessary for us to analyze the inherent effect of SPCC's formula since many of the revenue factors, including adjustments of 63,659,569 off-peak and 21,067,630 SPRINT LTD. minutes have been disallowed,[22] leaving these originally claimed off-peak minutes included in the gross minute figure. Because the adjustments other than the off-peak discount are deducted first from gross minutes, these adjustments, as reflected in our September 29, 1982 *MO&O*, must include some off-peak minutes.

18. This by itself does not create a problem as long as the actual off-peak deduction is taken from a net figure (gross minutes minus other adjustments), to reflect the fact that some off-peak minutes have already been excluded. However, it is now apparent that we improperly deducted at least part of the off-peak adjustment from the gross minute figure. The off-peak deduction approved in the *MO&O* was calculated from information supplied in SPCC's May 25, 1982 Initial Report and from additional data on SPRINT LTD. minutes provided by letter dated September 14, 1982 from Mitchell F. Brecher of SPCC to the Chief of the Common Carrier Bureau.[23] The portion of the off-peak deduction relating to SPRINT LTD. minutes is correct because it was separately calculated. However, the portion of the off-peak deduction relating to non-SPRINT LTD. minutes was determined by applying the 40/60 percent discount to gross minutes minus total SPRINT LTD. minutes when it should have been applied to net minutes minus total SPRINT LTD. minutes.[24] Therefore, to the extent that the non-SPRINT LTD. part

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which to subtract the originally approved percentages of other adjustments. Under this method, as percentages of net rather than gross minutes, the other adjustments rather than the off-peak deduction itself would be reduced, and would yield a total monthly average of 72,016,581 minutes.

[21] SPCC adjusted the numerator for the following factors: Texas revenue, rounding, independent telephone company ENFIA, monthly minimum revenue, normalization, official traffic and no answer supervision; and the denominator for the following factors: seven day study, normalization, division of revenues equivalency, late delivery of lines, SPRINT IV adjustment, testing and trouble. SPCC Initial Report, May 25, 1982, WP-2&3.

[22] *See* MO&O, Table 5.

[23] *Id.*, Table 4.

[24] The discount was applied to the off-peak portion of gross minutes (27.13% of gross for evening and 11.54% for night traffic) claimed in SPCC's Initial Report, May 25, 1982, WP-88.

of the off-peak deduction should have been figured against net rather than gross minutes, it is in error. Since AT&T's proposed correction is not limited to non-SPRINT LTD. off-peak minutes, we will not accept it. Instead we merely recompute the non-SPRINT LTD. portion of the off-peak deduction against SPCC's net minutes.

19. The net minutes we use here are slightly different than as calculated in our September 29, 1982 *MO&O* because we have determined that AT&T's rounding of SPCC's revenue factors created some distortions in the computation of adjustments. With one exception, we have used SPCC's reported revenue factors to refigure the adjustments.[25] As a result of these recalculations, SPCC's non-SPRINT LTD. off-peak deduction is computed against a net minute figure of 223, 137, 132.[26] The total revised off-peak deduction, including SPRINT LTD. minutes, is 65,931,711 minutes. The revised total monthly average of SPCC's minutes is 70,915,760 or an average of 3325 minutes per month per line.[27]

20. SPCC also has excepted to the exclusion adopted by the Commission for SPCC's use of ENFIA-like facilities obtained from independent telephone companies. In addressing this issue, SPCC argues, as it did in its July 1, 1982 pleadings, that AT&T's conversion of the independent telephone company revenue factor of 0.0354 to a .018 percent reduction from gross minutes is inappropriate, that AT&T offered no justification for the 50 percent reduction of the exclusion, and the Commission's adoption of AT&T's modification as a reflection of the fact that independent telephone company ENFIA are generally used on only one end of a call is incorrect in light of the revenue-based methodology SPCC has used. SPCC therefore believes that the deduction for independent telephone company ENFIA should be doubled from 6,397,537 to 12,533,751 minutes.

21. We note first that SPCC's criticisim of AT&T's conversion of revenue factors into minutes is incongruous in view of SPCC's own use of minutes in the derivation of revenue factors, particularly for independent telephone company ENFIA.[28] In any case, we find nothing in SPCC's revenue-based methodology itself to indicate that the claimed independent telephone company adjustment should not be reduced by approximately half to properly reflect the actual

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[25] The exception is the factor used for independent telephone company ENFIA, which we have recalculated from data provided in SPCC's Initial Report, May 25, 1982, WP-19. *See* Table 3, *infra*. The recalculated factor is the same as the one proposed by AT&T and used in the MO&O.

[26] This number reflects SPCC's gross minutes minus allowed non-off-peak adjustments, as recalculated using SPCC's original revenue factors, minus the 55,541,860 SPRINT LTD. minutes reported in the September 14, 1982 letter for which the permissible off-peak deduction was separately calculated. *See* Appendix, Table 3, *infra*.

[27] *See* Appendix, Table 1, *infra*.

[28] SPCC Initial Report, May 25, 1982, WP-19.

technical configuration of these connections. SPCC's revenue factor was developed on the basis of minutes terminating in independent exchange areas. Assuming an in/out ratio of 50 percent, the application of the 0.0354 factor to single-counted minutes would provide the proper number of independent telephone company minutes for the non-ENFIA end of calls transiting independent exchanges. However, since we have doubled SPCC's single reported total minutes to account for the usual occurrence of ENFIA at both ends of a call, the use of the 0.0354 independent telephone company factor, as a percentage of gross minutes, yields twice as many deductible minutes as are appropriate. Thus, as explained in the *MO&O*, we believe that AT&T's 1.8 percent factor, as applied to SPCC's doubled minutes, yields the correct number of excludible independent telephone company ENFIA minutes.[29]

22. Finally, SPCC asserts that the figure of 4474 minutes approved in the *MO&O* for use in the determination of Level D ENFIA rates overstates the minutes that would be found under a correct application of the ENFIA agreement. SPCC maintains that we must apply permissible adjustments uniformly to the gross minutes of all OCCs. SPCC has prepared tables for each of the reporting OCCs demonstrating a consistent application of the approved adjustments, with modifications for SPCC and MCI in accordance with their positions on reconsideration and imputed adjustments for Teltec and Satelco, two resale carriers whose filed summary data concerning ENFIA minutes and lines were included in our calculations of weighted average OCC billed minutes.[30] According to SPCC, the use of these modified and imputed values for the approved adjustments yields a weighted average of OCC minutes of use of 4149.[31]

23. We agree that, given adequate information, the adjustments we have approved for MCI, SPCC and USTS should be applicable to the minutes of all carriers that pay for local exchange connections under the ENFIA tariff. However, many of these carriers, particularly the resale carriers, are not known to us.[32] Those resellers with very low overall volumes of traffic probably do not have the resources with which to count and report properly adjusted minutes. Therefore, enforcement of reporting requirements for all resellers paying for ENFIA would be extremely difficult. Moreover, reliance

[29] *See* MO&O, Appendix B, p. 2. *See also* note 23, *supra* and Table 3, *infra*.

[30] *See* Table 6 of Appendix B to the September 29, 1982 MO&O.

[31] SPCC Opposition, November 8, 1982, Appendix A.

[32] Identification of the resellers subject to ENFIA is made difficult by the fact that under our Competitive Carrier Rulemaking in CC Docket No. 79–252, resellers, which are those carriers that do not own any transmission facilities but obtain basic communications services from underlying carriers for resale purposes, are exempted from certification requirements under Section 214 of the Act, 47 U.S.C. § 214. Second Report and Order, 91 FCC 2d 59 (1982), *reconsideration*, FCC 83–69, released March 21, 1983.

on minutes filed voluntarily by resale carriers presents problems of self-selection since only those with relatively low averages of minutes per line per month are likely to file reports. Therefore, voluntarily filed minutes provide an unrepresentative sample of resellers' ENFIA minutes. In the case of Satelco and Teltec, resale carriers that did file minutes for 1981, no adjustments to gross minutes were claimed, and we have no data with which to verify the accuracy or applicability of the deductions SPCC has imputed on their behalf. Thus, we have no basis for accepting the adjustments to their minutes urged upon us by SPCC. However, we recognize that the inclusion of the unadjusted minutes of these carriers in the OCC total probably creates slight inconsistencies. In view of the fact that the inclusion or exclusion of the Teltec and Satelco minutes has a negligible impact on the total average OCC minutes per month per line, we will eliminate them altogether from the calculation of the OCC minutes used in Level D rates.[33]

C. USTS

24. In its opposition to AT&T's petition, USTS argues that AT&T has incorrectly assumed that USTS' deductions for Texas minutes, independent telephone company ENFIA, resold MTS and WATS, testing, rounding and billing adjustments are equally applicable to peak and off-peak minutes. USTS claims that it incurs most of these deductions during peak periods and that, as a result, an adjustment for off-peak usage against gross minutes yields a more accurate billed minute count than an adjustment against net minutes. However, admitting that at least some of its off-peak minutes have been double counted, USTS proposes that its off-peak deduction of 13,910,419 minutes remain the same but that its other adjustments be recomputed. USTS provides recalculations of each of these other deductions based on an allocation of the affected minutes between peak and off-peak periods. For instance, USTS now claims that 86.56 percent of all billing adjustments for fraudulent usage are related to peak minutes and that 10.32 percent and 3.12 percent are related to evening and night minutes, respectively. By weighting the evening billing minutes by .60 and night billing minutes by .40, USTS would recalculate its billing adjustment to be 12,701,022 minutes[34] compared to AT&T's recalculation of 11,149,168 minutes.[35] Combined, USTS' allocation based revisions would permit the deduction of

[33] The elimination of the minutes from the OCC total average used in computing the tariff rate does not alter the obligation of resellers to pay ENFIA charges for the use of local exchange interstate services. AT&T-Applicability of ENFIA Tariff to Certain OCC Services, 91 FCC 2d 568 (1982), *review pending sub nom. U.S. Telephone Communications, Inc. v. FCC*, D.C. Cir. No. 82–2324 (and consolidated case) (filed November 3, 1982). *See* note 65, *infra*.

[34] USTS Opposition, November 8, 1982, Attachment 1.

[35] AT&T Petition, October 19, 1982, Attachment I.

5,183,429 more minutes from USTS' gross minutes than would AT&T's revisions. All of USTS' revisions are based on peak/off-peak allocation factors derived from 1982 data.[36] Records from which comparable ratios could be calculated for 1981, the test period year for the ENFIA rates at issue, were not available.

25. AT&T argues that USTS' position constitutes a concession of methodological error and that its claim that most of its deductions occur during peak periods is untimely made and unsubstantiated. We agree with AT&T that it is inappropriate in the context of this reconsideration for USTS to propose the adoption of an entirely new methodology for the calculation of these deductions. There is nothing in the record that supports a presumption that USTS followed this allocation methodology when preparing its original submissions in this proceeding. Indeed, the fact that USTS now recalculates all of these deductions based on 1982 usage data and admits the absence of similar traffic information for 1981 indicates that USTS' usage allocation theory is a recent innovation that bears no relationship to the position that USTS has previously taken. We cannot permit such a retroactive modification of a record pertaining to 1981 minutes based on 1982 data. Even if we could do so, we find that, except perhaps in the case of official usage, the proposition that the minutes pertaining to each of these adjustments occur mainly in peak periods is counterintuitive and that USTS has not provided adequate support for the usage allocation factors it proposes. Neither we nor the other parties have sufficient information with which to verify the derivation of these factors. For these reasons, we cannot accept USTS' recalculations.

26. USTS proposes other adjustments to its deductions. First, USTS maintains that the minute counts for some of its deductions, as doubled in Appendix B of AT&T's June 21, 1982 comments, are incorrect. USTS argues that, through mathematical error, AT&T understated the company usage and testing adjustment by 136,095 minutes, the rounding adjustment by 91,572 minutes and the billing adjustment by 283,476 minutes. AT&T asserts that these discrepancies between a simple doubling of USTS' minutes and the figures appearing in AT&T's June 21, 1982 Appendix B result not from mathematical error but from precise calculations necessary to reflect the fact that only USTS' MTS-like City Call minutes were

[36] USTS claims that 86.56% of its billing adjustments, 77.14% of its Texas intrastate minutes, 90.09% of its company usage and testing and 88.19% of its resold/MTS/WATS minutes are related to peak usage. USTS allocates the peak/off-peak usage for its rounding adjustment by using 1982 traffic statistics to calculate the number of messages by time period (day, evening, night) and multiplying the total for each time period by fifteen seconds. *See* USTS Opposition, November 8, 1982, Attachments 1–5.

doubled while its WATS-like SPNS Plus minutes remained single counted.[37] The application of the formula (2 MTS + WATS) to USTS' minutes yields a "doubling" factor of 1.95804 which, when applied to USTS' claimed deductions, produces the numbers used by AT&T and adopted in our September 29, 1982 *MO&O*. Because OCC calls terminating on WATS lines employ ENFIA connections at only one end, minutes generated by these calls properly are not doubled. Therefore, we affirm our acceptance of AT&T's calculations.

27. However, we do accept USTS' assertions that the adjustment for independent telephone company ENFIA is understated. In reporting its original number of 1,095,874 minutes for calls terminating over independent telephone company ENFIA-like facilities,[38] USTS halved the actual number of such minutes to reflect the fact that an ENFIA connection is used on one end of such calls.[39] USTS now argues that, as a result of doubling and the application of a peak-off-peak allocation factor, it should be permitted an exclusion of 1,848,170 for independent telephone company ENFIA.[40] Because we do not accept USTS' peak/off-peak allocation factors, we calculate the doubled independent telephone company ENFIA as 2,191,748 minutes.[41] In contrast, USTS' 1,232,678 resold MTS/WATS minutes are correctly single counted and we reject USTS' contention that its adjustments for resold MTS and WATS should be doubled.[42]

28. Because we have not been persuaded that USTS' original deductions were properly adjusted so as not to include off-peak minutes that are also contained in the off-peak discount, and since it is obvious from USTS' present position that some off-peak minutes have been double counted, it is necessary to recalculate USTS' billed minutes. However, because we do not accept USTS' peak/off-peak allocation factors and other adjustments, it is apparent that we cannot adopt USTS' revised figure of 14,684,171 average monthly minutes of use which yields a monthly average of 3618 minutes per line.[43] AT&T proposes that USTS' average minutes per month be adjusted to 16,407,384 and its average minutes per line per month to

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[37] *See* AT&T Comments, June 21, 1982, Appendix A.

[38] USTS letter from Randall B. Lowe to Chief, Common Carrier Bureau, dated June 4, 1982, Response to AT&T Request B-3.

[39] *See* USTS Reply, July 1, 1982, p. 17.

[40] USTS Opposition, November 8, 1982, Attachment 6.

[41] *See* Appendix, Table 4, *infra*. The 1.95804 factor is not applicable here because the independent telephone company ENFIA connections were actually measured.

[42] USTS proposed figure for resold MTS and WATS, revised by doubling the original reported number and applying a peak/off-peak allocation factor is 2,325,127 minutes. USTS Opposition, November 8, 1982, Attachment 6.

[43] USTS Opposition, November 8, 1982, Attachment 7. This number reported by USTS, which contains a slight mathematical error, actually should be 14,684,164. The correction has no effect on the average number of minutes per line. In our September 29, 1982 MO&O, we found USTS to have 14,821,597 average minutes per month and 3652 monthly average number per line.

4042. These numbers are arrived at by reducing the off-peak adjustment by 34.2 percent, the aggregate percentage reduction from gross minutes of all of the allowed adjustments other than the off-peak adjustment.[44] However, in order to remain consistent with our original methodology and the adjustments we have applied to the minutes of MCI and SPCC, we will simply recalculate the off-peak adjustment for USTS by applying the 40/60 percent discount to the off-peak portion of 57,279,335 net rather than 88,737,050 gross minutes.[45] This results in a total off-peak discount of 8,975,672 minutes, a monthly average of 16,101,221 minutes, and an average of 3967 minutes per line per month.[46]

D. *Summary*

29. As a result of the revisions described above, MCI's monthly average is reduced to 169,509,481 minutes and SPCC's and USTS' monthly averages are increased to 70,915,760 and 16,101,221 minutes respectively. The total of the monthly averages for all three OCCs is 256,526,462 and the weighted monthly average OCC minutes per line is 4555. This increases our original calculation of Rate Element 2 from $34.85 to $35.42 and Rate Element 3 from $148.61 to $151.30, producing an increase in the overall Level D rate from $183.46 to $186.72 per line per month. Because we have determined that $186.72 is a just and reasonable rate for Level D charges under the agreement, the adjustment provision in paragraph 30 of our *Designation Order* applies to this revised rate rather than the $183.46 rate.

III. *SPCC and USTS Petitions*

30. The separate petitions for reconsideration filed on October 29, 1982 by SPCC and USTS concern that portion of our September 29, 1982 *MO&O* that requires the OCC's retroactively to adjust the ENFIA payments made during the five month suspension and investigation period for the difference between the interim billing and collection rate of $178.46 then in effect and the $183.46 rate ultimately established.[47] USTS and SPCC make several arguments in support of the conclusion that the imposition of such a retroactive adjustment is beyond the authority of the Commission under the Act. First, they argue that the Commission's reliance on Section 4(i)

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[44] AT&T Petition, October 19, 1982, p. 6. Alternatively, AT&T demonstrates that the originally approved off-peak adjustment of 13,910,419 may be subtracted from gross minutes first, leaving a smaller net figure from which to subtract the approved percentages for the other adjustments, yielding a monthly average of 16,411,974 minutes. AT&T Petition, October 19, 1982, Attachment I.

[45] The percentages of off-peak traffic (28.87% evening and 6.88% night) were derived from Volume 7 of USTS' May 25, 1982 Initial Report. *See* MO&O, Table 4.

[46] *See* Appendix, Table 1, *infra*.

[47] MO&O, at para. 36. *See also* Designation Order, 90 FCC 2d at 215–216.

of the Act, 47 U.S.C. § 154(i), as authority to require this retroactive adjustment is misplaced because that section specifically prohibits the issuance of orders inconsistent with the Act,[48] They contend that, under the regulatory scheme concerning tariffs set forth in Sections 203–205 of the Act, 47 U.S.C. §§ 203–205, the Commission may only require carriers, not their customers, to pay refunds if the final rate is lower than the interim rate.[49] USTS and SPCC espouse the view that the lack of specific statutory provisions for retroactive adjustments applicable to customers must be read as evidence of Congressional intent to prohibit the imposition of such a requirement. Second, USTS and SPCC assert that *Lincoln Telephone and Telegraph Co.*, 72 FCC 2d 724 (1979), *aff'd*, 659 F.2d 1092 (D.C. Cir. 1981), provides no support for a retroactive adjustment in this case. They observe that in *Lincoln* the Commission's order directing the use of the ENFIA tariff as an interim billing and collection rate subject to adjustment was upheld because Lincoln Telephone had a duty to interconnect with MCI but did not have a lawful exchange access tariff of its own. They argue that *Lincoln* involved factual circumstances outside of the tariff process and that it is distinguishable from the present case where interconnection was not an issue and the investigation concerned an effective exchange access tariff already on file with the Commission. SPCC also argues that the requirement violates the terms of our *Designation Order*, in which a retroactive adjustment was conditioned on a finding of a just and reasonable ENFIA rate. According to SPCC, in the *MO&O* the Commission did not and could not have found the $183.46 rate to be "just and reasonable" within the cost-based standards that in the past we have found inherent in Section 201(b) of the Act, 47 U.S.C. § 201(b).[50] Moreover, SPCC contends that the Commission's establishment of a rate and required adjustment constitutes retroactive ratemaking in contravention of a central regulatory principle.

31. In an Opposition filed on November 5, 1982, AT&T contests the applicability of USTS' and SPCC's strict construction of the Act to the novel circumstances surrounding the ENFIA agreement and implementing tariff. AT&T asserts that the Commission is not engaged in a routine investigation under Section 204 of a carrier-initiated tariff but rather that the Commission is confronted with the task of evaluating data filed by competing carriers in order to

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[48] Section 4(i) states:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

[49] The Commission may impose accounting orders and require carrier refunds under 47 U.S.C. § 204.

[50] In support, SPCC cites our decisions in AT&T (WATS) 59 FCC 2d 611, 678 (1976), Private Line Rate Case, 34 FCC 2d 244, 247 (1961), and Hi-Lo, 55 FCC 2d 224, 241 (1975).

interpret a rate agreement between them. Thus, AT&T maintains the Commission properly invoked its general discretionary authority under Section 4(i) here as it had in *Lincoln* to order an interim billing and collection rate subject to adjustment, either upward or downward, to protect the interests of all parties and the public.[51]

32. We believe that, under the unique circumstances surrounding this proceeding, the establishment of an interim billing and collection rate during the investigation period was desirable to protect the interests of the parties as well as the public. In order to assure consistency with the statutory scheme governing interconnection and charges for interconnection in Sections 201–205 of the Act, 47 U.S.C. § § 201–205, the two way retroactive adjustment provision as set forth in the *Designation Order* and as applied in the *MO&O* was a necessary and suitable concomitant of the interim rate and fully within our authority under Section 4(i). The appropriateness of the adjustment provision is directly related to the propriety of the interim billing and collection rate itself. Therefore, we will briefly review the reasons why the interim billing and collection rate was essential.

33. In the context of the overall intent and purpose of the ENFIA agreement and implementing tariff, this proceeding involves certain considerations of policy, the public interest and practicality that distinguish it from a conventional investigation of a carrier-initiated tariff change. The policy served by the agreement and tariff is the assurance of continued interconnection of competitively provided MTS/WATS-type services with exchange facilities for reasonable compensation to local telephone companies. As we have described in numerous previous decisions, the structure of the ENFIA tariff was forged by agreement between AT&T and the OCCs in response to the need to implement the Commission's interconnection policies[52]

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[51] AT&T also asserts that because none of the OCCs petitioned for reconsideration of the Designation Order their objections to the retroactive adjustment in the instant petitions are not timely made. However, this argument fails because, as USTS and SPCC have noted, in our Designation Order we did not actually order an adjustment or make any other final adverse rulings against any of the parties that would have required petitions for reconsideration to be filed only at that time. 47 C.F.R. § 1.106(a). *See* Service Electric Cable TV, Inc., 51 FCC 2d 763, 764 (1975).

[52] *See* Specialized Common Carrier Services, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); Bell System Tariff Offerings, 46 FCC 2d 413 (1974), *aff'd sub nom.* Bell Telephone Co. of Pennsylvania v. FCC, 503 F. 2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); MCI Telecommunications Corp., 60 FCC 2d 25 (1976), *rev'd in part sub nom.* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (1977), *cert. denied*, 434 U.S. 1040 (1979) (Execunet I); AT&T, 67 FCC 2d 1455, *rev'd sub nom.* MCI Telecommunications Corp. v. FCC, 580 F. 2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) (Execunet II).

despite substantial uncertainty as to the proper measure of the cost of interconnection for OCC MTS/WATS-type services.[53] In the absence of actual cost information and in recognition that the development and examination of such data would be a time consuming and difficult task, we adopted, as a reasonable interim solution, an agreed upon mechanism which simulates the amount paid for interconnection by AT&T as determined through the jurisdictional cost separations process, discounted by Factor P to account for both the technically inferior arrangements provided to the OCCs and the nature of the marketplace.[54] Thus, ENFIA is inherently a temporary measure, intended to provide a means of approximating costs that cannot be known with precision until a more permanent access charge system can be put in place.[55] By its very nature, ENFIA cannot be held to the same cost-based standards as conventional carrier-initiated tariffs. Yet, the lack of "mathematical nicety" does not detract from its usefulness in ensuring interconnection at reasonable rates, as required under Section 201 of the Act, 47 U.S.C. § 201. Since an access charge plan had not been finalized by the time Level D rates were to become effective, the ENFIA agreement remained our best means of fulfilling this statutory responsibility.[56]

34. Our public interest concerns also differ somewhat in this case from those arising in other tariff proceedings. Because of the peculiar circumstances that surround the ENFIA rate, we believe that our statutory responsibility to ensure its reasonableness as an interim measure includes the task of making sure that consumers of AT&T and OCC services are not indirectly disadvantaged through

[53] ENFIA, 71 FCC 2d at 541–457 (1979); Extension Order, 90 FCC 2d at 12 (1982); Designation Order, 90 FCC 2d at 203–205 (1982); ENFIA, Mimeo CC 5919, released August 23, 1982, at paras. 6–15; Memorandum Opinion and Order, FCC 82–431, released September 29, 1982, at paras. 10, 26–29, 34–35.

[54] Access arrangements provided through line side terminations with a Class 5 switch require the dialing of extra digits by OCC customers to reach the OCC switch and result in channel noise characteristics as well as lack of dial pulse access call billing and automatic number identification for OCC services. These factors have been viewed as evidence of diminished value in comparison with AT&T services that justifies a significant discount for OCC connections. *See* ENFIA, 71 FCC 2d at 455; Extension Order, 90 FCC 2d at 15.

[55] Paragraph 6 of the ENFIA agreement explicitly provides for the automatic termination of the interim charges upon the filing of cost based access charge tariffs either pursuant to an order of the Commission in the MTS and WATS Market Structure Inquiry (CC Docket No. 78–72) or legislation.

[56] Under Section 4(j), 47 U.S.C. § 154(j), we may control the disposition of our caseload, and have been well within our authority to leave the cost issues underlying access charges for resolution in our ongoing MTS and WATS Market Structure Inquiry, (CC Docket No. 78–72). *See* Nader v. FCC, 520 F. 2d 182, 195–198. (D.C. Cir. 1975). *See also*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543–544 (1978); FCC v. Schreiber, 381 U.S. 279, 289–293 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143–144 (1940).

either the demise of competitive alternatives as a result of ENFIA rates that are too high or the placement of unreasonable burdens on other services if ENFIA rates are too low.

35. The guidepost available to us in our fulfillment of our responsibilities to the carriers and to the public is the approved ENFIA agreement itself. The agreement contemplated that interconnection charges would increase under a prescribed formula as OCC minutes and separations allocations to the interstate jurisdiction grow,[57] and that the charges effective during Phase II be subject to a discount (Factor P) determined by the Commission.

36. Following the extension of the agreement into Phase II, 90 FCC 2d 6 (1982), and the filing of proposed tariff revisions on April 16, 1982 by AT&T, we were confronted with numerous practical difficulties in ensuring that our policy and public interest responsibilities under Sections 1 and 201(a) could continue to be met. First, the parties engaged, for the first time, in disputes over the proper count of billed minutes and calculation of the SEP Amount. These disputes necessitated the institution of an investigation in order to find the appropriate rate within the terms of the ENFIA agreement. Second, the relevant terms of the agreement themselves were found to be ambiguous, especially in light of changed market circumstances. Therefore, the investigation necessarily involved a more time consuming task than the mere tallying of numbers since we had to be sure that through its revisions AT&T did not "unilaterally abrogate [its] private [carrier-to-carrier] contracts by filing tariffs altering the terms of those contracts." *MCI v. FCC*, 665 F.2d 1300, 1302 (D.C. Cir. 1981). Third, it was clear that we could not conclude such an investigation before May 2, 1982, the expiration date under the tariff of the Level C rates then in effect. The only tariffed ENFIA rates that could possibly be in effect after that date were the higher proposed Level D rates that were the subject of the investigation. Fourth, we were presented with the necessity of providing for the continuation of ENFIA interconnection arrangements during the pendency of the investigation.

37. The unique combination of these policy, public interest and practical factors severely constrained the actions that we could take. We could have permitted the higher rate to go into effect automatically on May 2, 1982, but this would have caused potentially grave dislocations in the marketplace despite the possibility that AT&T ultimately might have to refund to the OCCs the difference between its proposed rate and the one finally approved. In refusing to permit AT&T's proposed higher rates to go into effect on schedule, we acted to protect the interests of the OCCs and their customers. Neverthe-

[57] Paragraph 10, note ** of the ENFIA agreement provides that the SEP Amount will increase each year to reflect growth in separation allocations, unless the SEP Amount is capped. The agreement contains no explicit reference to the capping of minutes although the parties voluntarily did so during Phase I.

less, rejection of the proposed tariff was deemed unwarranted, 90 FCC 2d at 211, and would have resulted in the lack of an effective access tariff once the Level C rates expired on May 2, 1982. Suspension and investigation under Section 204, 47 U.S.C. § 204, was the only reasonable course. However, a five month suspension period with no interim rate also would have resulted in the lack of an applicable interconnection rate after May 2, 1982, creating market disturbances including possible disruption of interconnection arrangements. Therefore, contrary to the assertions of SPCC and USTS, because it had been determined that AT&T's proposed tariff revisions for Level D rates should be suspended, once the Level C rates expired on May 2, 1982, the availability of tariffed interconnection was no greater here than in *Lincoln Telephone and Telegraph Co.*, 72 FCC 2d 724, *aff'd.*, 659 F. 2d 1092, and the same need for an interim rate existed.[58]

38. Given the data that had initially been supplied by the parties indicating increases in OCC minutes of use and AT&T costs per minute, we were confident that the Level D rate ultimately determined would exceed the $122.20 Level C rate then in effect. Since we also recognized that certain adjustments to OCC minutes might reasonably be required, we believed that a rate approximating a middle ground between the divergent positions of the parties would best serve the interests of the carriers and the public during the period that an examination of the data was being conducted. We had no record upon which to base a prescription of a rate under Section 205(a) and could not allow a temporary partial authorization of AT&T's proposed tariff rate under Section 204(b) since that option had been opposed by AT&T.[59] However, having formed a "tentative opinion about the location of the line between . . . the reasonable and the unreasonable," we were not obliged "to engage in a pointless charade in which carriers . . . are required to submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 653 (1978). Thus, in this case, as in *Lincoln*, our reliance on our general discretionary authority under Section

[58] In both cases, the OCCs might have assumed that, in the absence of an effective access tariff, they could have secured interconnection merely by obtaining ordinary business lines from the local operating company. However, the local tariffs offering business lines restrict their use so as to preclude resale or employment as the local distribution element for MTS/WATS-type services offered by common carriers. The very existence of the ENFIA agreement testifies to the inappropriateness of business line rates for this kind of service.

[59] Letter from AT&T to Chief, Common Carrier Bureau dated April 21, 1982. *See* Designation Order, 90 FCC 2d at 203. Temporary partial authorizations of tariff rates under Section 204(b) require a prior "written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable." 47 U.S.C. § 204(a). *See* MCI v. FCC, 627 F.2d 322, 325 (D.C. Cir. 1980).

4(i) to set an interim rate was a necessary consequence of our responsibilities under Sections 201–205 to ensure interconnection on terms and conditions that are just and reasonable for all affected parties.

39. As *Lincoln* makes clear, the very characteristic of an interim rate established by the FCC that renders it a valid exercise of discretionary power not inconsistent with the Act is that it is accompanied by a two-way adjustment. 659 F.2d at 1107. Such an adjustment ensures that the interim rate does not necessarily represent the compensation that ultimately will be received for the interconnections provided. An essential aspect of the fairness of an approximated rate, which is set without the benefit of hearings under Section 205(a) and is not a partial authorization of a carrier-initiated tariff supported by prior written showings of reasonableness under Section 204(b), is that neither party is bound to the interim arrangement. Thus, a two-way adjustment, under which either the OCCs or AT&T could be made to refund the difference between the interim and final rates to the other party, was a necessary substitute for the specific provisions for the determination of reasonableness contained elsewhere in the Act.

40. Moreover, we cannot agree with SPCC and USTS that the two-way adjustment was in direct conflict with the tariff review scheme set forth in Sections 203–205. This case is not analagous to the situation in *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973), where the court found that a plan requiring Commission approval prior to the filing of new rates would circumvent the entire scheme set forth in Sections 203–205 of carrier-initiated rate changes, limited suspension periods, rate refunds and rate prescription only after hearings and specific findings. Here we did not disturb this scheme, but found that, because of the dislocations that would occur if either the tariff were allowed to lapse or AT&T's high rate were allowed to go into effect, an interim arrangement supplementary to this scheme was necessary to protect the interests of the public and the carriers. The express provisions in Section 204 for refunds by carriers to customers were not meant to preclude the sort of adjustment at issue here. The ancillary power of a regulatory agency to impose such an adjustable interim rate is derived from the "mandate to assess the reasonableness of . . . rates and to suspend them pending investigation if there is a question as to their legality," and does not depend on an explicit statutory grant of authority. *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 654, *citing U.S. v. Chesapeake & Ohio R. Co.*, 426 U.S. 500, 514 (1976). It is well recognized that "the discretion that must be afforded the Commission in the exercise of its ratemaking power is enhanced by Section 4(i) of the Communications Act," and that the lack of specific mention of certain powers does not constitute denial. *Nader v. FCC*, 520 F.2d 182, 203–204 (D.C. Cir. 1975). The Act cannot be read so

literally as to deprive the Commission of the necessary means of effectuating interconnection at reasonable rates.

41. Finally, due to the contractual basis of ENFIA rates, the adjustment provision does not run afoul of the ratemaking convention that prohibits a utility from setting rates to recoup past losses. *See generally Nader v. FCC*, 520 F.2d at 202. Here there was no attempt by AT&T to set Level D rates to recover losses incurred in a period prior to the predetermined effective date of those rates. Rather, the investigation focused on an examination of data provided by both AT&T and the OCCs for the study period relevant to Level D rates in order to achieve a reasonable rate within the terms of the agreement. The "past losses" which either party would bear as a result of having to make a refund to the other were a function of the difference between an interim rate set by the Commission and the actual rate finally determined to be due under the ENFIA agreement as interpreted and applied by the FCC.[60] As in *Lincoln*, we are here presented with the task of overseeing the terms and conditions of interconnection between "unwilling partners." In this case, the competitors have been engaged in a dispute over a rate that was to be established according to the terms of an agreed formula and effective on a predetermined date. Because our investigation was aimed at finding the proper rate under the agreement, we see little difference between this case and *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979), where the enforcement of an agreed upon prior effective date for rate increases was not considered retroactive ratemaking. Furthermore, under circumstances where it is the terms of an agreement that are at issue and both sides have participated in the proceeding and have been given notice as to the actual effective date of the rate, and where any of the parties may be responsible for error, fairness dictates that a retroactive adjustment be applicable to either side. *See U.S. v. CAB*, 510 F.2d 769,775 (D.C. Cir. 1975). For these reasons, the SPCC and USTS petitions are denied.

IV. *SBS Petition*

42. In its petition for reconsideration, filed on October 29, 1982, SBS objects to the imposition of increased ENFIA rates on carriers that are non-signatories to the original agreement and proposes that

[60] SPCC is correct in asserting that we did not find the $183.46 rate to be just and reasonable in the Section 204(a) sense of that term. *See* AT&T-Applicability of ENFIA Tariff to Certain OCC Services, 91 FCC 2d 568, 575 n.12 (1982), *review pending sub nom.* U.S. Telephone Communications, Inc. v. FCC, D.C. Cir. No. 82–2324 (filed November 3, 1982). We did, however, find the Level D rates to be "just and reasonable *under the agreement.*" MO&O, at para. 35. Because of the contractual basis and temporary nature of ENFIA, *see* paras. 32–35, *supra*, we properly confined our inquiry to what was reasonable within the intentions of the parties as expressed in the ENFIA agreement.

on reconsideration we modify our decision to preserve the *status quo* that existed before the Commission issued its *Designation Order.* This *status quo* would require the calculation of Element 3 rates on the basis of 3000 minutes and a Factor P of 55%, values that were reflected in Phase I Level C rates. SBS also argues that the $0.0595 SEP Amount, effective in 1981 and adopted in our *MO&O* for use in 1982, is appropriate because it may be used without reference to the status of an OCC as a signatory or non-signatory to the ENFIA agreement. Thus, SBS proposes a return to the $99.65 Element 3 rate.[61] SBS argues that the imposition of higher ENFIA rates on all carriers penalizes nonsignatories whose MTS/WATS-type services are still in the early stages of their operations since signatory OCCs paid much lower rates during the beginning stages of their operations. SBS believes that the inequities of this situation are largely a function of the fact that, in determining ENFIA rates, the Commission was guided by the principles of contract construction rather than the conventional principles of tariff review embodied in Sections 201(b) and 202(a) of the Act. Therefore, SBS maintains that the rationale supporting an increase in ENFIA rates for signatories is not applicable to non-signatories and that the "compromise solution" that it proposes would provide a period of stability until equal access interconnection tariffs become effective.

43. In its November 5, 1982 Opposition to the OCC petitions, AT&T notes that SBS does not suggest that different rates be adopted for non-signatories, but merely reiterates a proposal to extend Phase I rates into Phase II for all OCCs, a proposal which the Commission rejected in its *Extension Order.* AT&T maintains that such arguments more properly would have been made in petitions for reconsideration of our April 14, 1982 *Extension Order* and April 30, 1982 *Designation Order,* and that the present petition constitutes an impermissible collateral attack on prior final Commission decisions.[62] Although SBS maintains that in its instant petition it does not seek reconsideration of the *Extension* and *Designation Orders,*[63] but rather proposes revisions to the September 29, 1982 *MO&O* to avoid "unjust and inimical results," we find that SBS' arguments are

[61] It is unclear whether SBS would advocate the use of 3000 minutes in the Element 2 formula used for Level C rates, which would yield a rate of $22.55 for Element 2 and $122.20 overall, or in the formula used for Level D rates, which would yield an Element 2 rate of $24.51 and $124.16 overall.

[62] Under Section 405 of the Communications Act, 47 U.S.C. § 405 and Section 1.106(f) and 1.429(d) of the Commission's Rules, 47 C.F.R. §§ 1.106(f) and 1.429(d), reconsideration petitions filed after the expiration of the 30 day filing period cannot be considered.

[63] SBS has appealed these decisions before the U.S. Court of Appeals for the District of Columbia Circuit. Satellite Business Systems v. FCC, D.C. Cir. Nos. 82–1657, 82–1659 (filed June 14, 1982).

precisely the same as those that have been adequately disposed of elsewhere and are not properly before us here.[64] Therefore, SBS' petition is denied.[65]

V. *Ordering Clauses*

44. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 5(d)(4)-(6), 201, 203–205, and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(d)(4)-(6), 201, 203–205, and 405 that the American Telephone and Telegraph Co. Petition for Expedited Reconsideration IS GRANTED to the extent indicated herein, and is otherwise DENIED.

45. IT IS FURTHER ORDERED, That the Memorandum Opinion and Order in this proceeding, FCC 82–431 released September 29, 1982 IS MODIFIED as indicated herein.

46. IT IS FURTHER ORDERED, That AT&T shall file tariff revisions consistent with this order no later than three (3) days

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[64] In our Extension Order, we rejected proposals by SBS, USTS, U.S. Telephone Communications and Telesystems Management Corporation to use frozen Phase I rates during Phase II since such an action was not contemplated by the parties to the agreement and would have required the abandonment of the agreement itself, and since we found no basis for prescribing that ENFIA rate in the absence of the agreement. 90 FCC 2d at 12. *See* American Telephone & Telegraph Co. v. FCC 487 F. 2d 865. Also, in an order issued on delegated authority, the Chief, Common Carrier Bureau denied SPCC's motion to broaden the scope of the proceeding to establish an appropriate dollar level of payment for ENFIA connections in Phase II. Mimeo CC 5919, released August 23, 1982, at para. 6–15. There we also noted that, under the Sierra-Mobile Doctrine, the ENFIA agreement could not be abandoned or modified to establish a frozen rate since the ongoing investigation had to be completed before any determination could be made that the rate under the contract was unjust, unreasonable, unduly discriminatory, or preferential. United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). *See* Mimeo CC 5919, released August 23, 1982, at note 8.

[65] Although SBS has not specifically requested differential treatment for non-signatories, we note that we have also previously determined that the ENFIA tariff applies in all instances of exchange usage by interstate MTS/WATS-type switched message services, except where payments for the use of those local facilities have already been made by an underlying carrier through either ENFIA or the separations process. AT&T-Applicability of the ENFIA Tariff to Certain OCC Services, 91 FCC 2d 568. *See also* Lincoln Telephone and Telegraph Co., *supra*. (ENFIA tariff applicable to interconnection between MCI and non-signatory independent telephone company); Leased Data Services, Mimeo 32441, released June 12, 1980 (ENFIA tariff applicable to connections provided to reseller in originating cities of end-to-end MTS/WATS-type services). These decisions were reached in recognition of the fact that the ENFIA agreement was an industry-wide arrangement negotiated to resolve an industry-wide conflict, and that, by its terms, the ENFIA tariff is applicable to any carrier that requires the use of local exchange facilities in the provision of end-to-end MTS/WATS-type interstate services. We have not foreclosed non-signatories, such as SBS, from arguing in complaint procedures that the ENFIA rates as applied to them are unreasonable or otherwise unlawful. 91 FCC 2d at 571 n. 12.

following the date of release of this order, to be effective on one (1) day's notice.

47. IT IS FURTHER ORDERED, That Sections 61.38, 61.58 and 61.116 of the Commission's Rules are waived for the purpose of allowing AT&T to comply with this order.

48. IT IS FURTHER ORDERED, That this action is effective immediately.

49. IT IS FURTHER ORDERED, That, the Southern Pacific Communications Company, United States Transmission Systems and Satellite Business Systems Petitions for Reconsideration ARE DENIED.

50. This order is exempt from the provisions of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. It involves a rule applicable to particular rates and to practices relating to such rates within the meaning of the exemption contained in 5 U.S.C. § 601(2).

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendix

Table 1

Weighted Average OCC Minutes Per ENFIA Per Month

	MCI	*SPCC*	*USTS*
1. Gross Minutes	806,865,788	358,107,160	88,737,050
2. Exclusions Other Than Off-Peak	138,323,032	79,428,168	31,457,715
3. Off-Peak Deduction	160,014,314	65,931,711	8,975,672
4. Net Minutes	508,528,442	212,747,281	48,303,663
5. Average Per Month	169,509,481	70,915,760	16,101,221
6. ENFIA Lines	30,923	21,330	4,059
7. Average Minutes/Line/Month	5,482	3,325	3,967

OCC Total Average Billed Minutes Per Month	256,526,462
OCC Total ENFIA Lines	56,312
Weighted Average Billed Minutes Per Line Per Month	4,555

Level D ENFIA Charges

RE2 = 3.42 + (.00691 × 4555) × 1.015 =	$ 35.42
RE3 = .0595 × .55 × 4555 × 1.015 =	151.30

Table 2

Development of MCI Minutes of Use

I. Gross Minutes[1]	806,865,788

II.	Exclusions (other than off-peak)		
	Intrastate Texas[2]	63,155,879	
	Resold MTS/WATS[2]	2,659,350	
	Billing Adjustments[3]	72,507,803	
	Sub-Total		138,323,032
III.	Off-peak Deduction[3]		160,014,314
IV.	Net Minutes		508,528,442

Sources:

[1] MO&O, September 29, 1982, Table 3. Gross minutes from MCI Initial Report, May 25, 1982, p. 19.

[2] MO&O, September 29, 1982, Table 3.

[3] MCI Opposition, Table II.

Table 3

Development of SPCC Minutes of Use

I.	Gross Minutes[1]			358,107,160
II.	Exclusions (other than off-peak)			
		Factor (% Gross)	*Minutes*	
	Intrastate Texas	.0228[2]	8,164,843	
	Ind. Telco ENFIA	.0180[3]	6,445,929	
	Intracompany use/testing	.0026[4]	931,079	
	Rounding	.0517[2]	18,514,190	
	Billing/Uncollectibles	.1267[5]	45,372,177	
	Subtotal			79,428,168
	Net Base for off-peak deduction			278,678,992
III.	Off-Peak Deduction			
		Evening	*Night*	
	SPRINT LTD.[6]	35,291,298	20,250,562	
	Other Evening (223,137,132 × .2713)[7]	60,537,103		
	Other Night (223,137,132 × .1154)[7]		25,750,023	
		95,828,401	46,000,585	
	Off-peak factor	× .4	× .6	
	Total Deduction	38,331,360	+ 27,600,351 =	65,931,711
IV.	Net Minutes			212,747,281

Sources:

[1] MO&O, September 29, 1982, Table 3. Minutes for Sprint IV (3,635,490) and Sprint V (149,464,904) from letter from James M. Tobin to Chief, Common Carrier Bureau, June 4, 1982. Minutes for SPRINT LTD. (27,770,931) from SPCC Initial Report, May 25, 1982, Exhibit D. Gross minutes = SPRINT IV + 2 (SPRINT V + SPRINT LTD.).

[2] Letter from James M. Tobin to Chief, Common Carrier Bureau, June 4, 1982.

[3] Calculated from SPCC Initial Report, May 25, 1982, WP-19. Factor = [2 (Sample Minutes - Independent ENFIA Minutes) + Independent ENFIA Minutes] divided by Independent ENFIA Minutes. 0.0180 = 2,249,575 ÷ [2(63,600,033 - 2,249,575) + 2,249,575]. This reflects two exchange minutes for each non-independent telephone company billed minute.

[4] Factor for Intracompany Use (.0021) from SPCC Initial Report, May 25, 1982, WP-67; factor for Texting (.0005) from SPCC Initial Report WP-95.

[5] SPCC Further Reply, July 1, 1982, p. 8.

[6] Double SPRINT LTD. minutes reported in letter from Mitchell F. Brecher to Chief, Common Carrier Bureau, September 14, 1982.

[7] Percentages of evening and night minutes derived from SPCC Initial Report, May 25, 1982, WP-88. Multiplied by net minute figure (223,137,132) representing gross minutes (358,107,160) minus non-off-peak deductions (79,428,168) minus SPRINT LTD. minutes (55,541,860).

Table 4

Development of USTS Minutes of Use

I.	Gross Minutes[1]			88,737,050
II.	Exclusions (other than off-peak minutes)			
		Undoubled Minutes[2]	*Permissible Exclusion*	
	Intrastate Texas	2,090,535	4,181,070[3]	
	Ind. Telco ENFIA	1,095,844	2,191,748[4]	
	Intracompany use/Testing	3,243,446	6,350,797[5]	
	Rounding	2,182,372	4,273,172[5]	
	Billing/Uncollectibles	6,755,863	13,228,250[5]	
	Resold MTS/WATS	1,232,678	1,232,678	
	Subtotal			31,457,715
	Net base for off-peak deduction			57,279,335
III.	Off-Peak Deduction			
		Evening	*Night*	
	Evening Minutes (57,279,335 × .2887)[6]	16,536,544		
	Night Minutes (57,279,335 × .0688[6]		3,935,090	
	Off-Peak Factor	× .4	× .6	
	Total Off-Peak Reduction	6,614,618 +	2,361,054 =	8,975,672
IV.	Net Minutes			

Sources

[1] MO&O, September 29, 1982, Table 3. Minutes for City Call (43,T417,789) and SPNS Plus (1,901,472) from letter from Randall B. Lowe to Chief, Common Carrier Bureau, June 4, 1982. Gross minutes = 2 (City Call) + SPNS Plus.

[1] Letter from Randall B. Lowe to Chief, Common Carrier Bureau, June 4, 1982.

[3] Reported usage doubled.

[4] Reported usage (half of measured usage) doubled.

[5] Reported usage doubled through application of 1.95804 factor which reflects [2 (City Call) + SPNS Plus] divided by single counted City Call and SPNS Plus minutes.

[6] Percentages of evening and night minutes derived from USTS Initial Report, May 25, 1982, Volume 7.

STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY DISSENTING IN PART AND CONCURRING IN PART

In re: Exchange Network Facilities for Interstate Access (ENFIA)

The Commission's decision only underscores the validity of my previous dissents to the ENFIA approach to setting interstate access charges,[1] but, nevertheless, I will kick the dead horse again. The Commission should never have accepted the ENFIA contract, much less adopted the complicated, nonsensical, result-oriented structure with which we are now shackled. If the Commission had applied the principle which was recently accepted in the *Access Charge* order,[2] then the OCCs would pay their full share of interstate costs and there would be no need for the off-peak discounts, the 55% P factor and the other give-aways which have caused us such great difficulty in determining the proper amount that the OCCs must pay.[3] The only consolation I find is that as soon as the access charge tariffs become effective, the ENFIA tariffs and the free lunch will end.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON re: ENFIA

This decision generally affirms our order of September 29, 1982, which prescribed a rate increase for ENFIA facilities employed by

[1] *See* Dissenting Statement of Commissioner Joseph R. Fogarty, *ENFIA Memorandum Opinion and Order*, 91 FCC 2d 1079 (1982); Statement of Commissioner Joseph R. Fogarty, Concurring in part, Dissenting in part, *ENFIA Designation Order*, 90 FCC 2d 202 (1982); Dissenting Statement of Commissioner Joseph R. Fogarty, *ENFIA Extension Order*, 90 FCC 2d 6 (1982).

[2] *MTS and WATS Market Structure*, ___ FCC 2d ___ (1983).

[3] I concur in that portion of this order which affirms the Commission's decision to make retroactive adjustments in OCC ENFIA payments for the suspension and investigation period.

the OCCs. I concur with the result of this decision because the rate we have adopted today will not be disruptive to the market. However, I find it increasingly difficult to concur once again in a result which is based on the utilization of a faulty methodology and has not shed any light on the real issue of how costs should be allocated efficiently.

As indicated in my previous statements on this subject, the ENFIA process neither allocates costs in an efficient manner nor contributes to the important task of resolving the issues of access and separations. While I will not repeat my previous statements here, suffice it to say that I continue to find objectionable the use of a methodology which applies a traffic sensitive measure to calculate the rate for use of non-traffic sensitive plant. The continued use of the ENFIA formula penalizes OCC efficiency and produces a charge unrelated to cost. Moreover, it invites additional increases in the access rate paid by the OCCs without any real record to show that the increase is either cost based or appropriate. Such rate increases so close to divestiture and the implementation of cost-based access charges only serve to weaken the OCCs before cost-based competition with AT&T begins. This result is contrary to our procompetitive philosophy and highlights the need to conclude the access charge proceeding in an equitable and expeditious manner.

Comparative Issue
Diversification of Control
Ownership and Management, Integration of

In three party comparative broadcast proceeding, applicant A with substantial preferences for both diversification and integration over applicant B, and a substantial preference for integration over applicant C, is the preferred applicant.
–*Family Broadcasting Group*
BC Docket No. 81–808

FCC 83R–15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Jose J. Ortiz, Judith Mendez de Ortiz and Bessy A. Ortiz d/b/a	
FAMILY BROADCASTING GROUP Ponce, Puerto Rico	BC Docket No. 81–808 File No. BPH-800925AA
ZABA RADIO CORPORATION Ponce, Puerto Rico	BC Docket No. 81–809 File No. BPH-800930AD
MARSONA BROADCASTING CORPORATION Ponce, Puerto Rico	BC Docket No. 81–810 File No. BPH-801003AJ
For Construction Permit for a New FM Broadcast Station	

Appearances

Joseph M. Morrissey, on behalf of Family Broadcasting Group; *William P. Bernton* and *Francis E. Fletcher, Jr.*, on behalf of Zaba Radio Corporation; *Gary S. Smithwick*, on behalf of Marsona Broadcasting Corporation; and *Charles W. Kelley* and *Allan Moskowitz*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

Decision

(Adopted: February 23, 1983; Released: March 4, 1983)

Board Member Blumenthal for the Review Board:

1. This proceeding involves the mutually exclusive applications of Family Broadcasting Group (Family), Zaba Radio Corporation (Zaba), and Marsona Broadcasting Corporation (Marsona) for authority to construct a new FM broadcast station to operate on Channel 266 at Ponce, Puerto Rico. By Hearing Designation Order, 46 FR 59631, published December 7, 1981, their applications were designated for consolidated hearing on limited financial qualifications issues against Family and Marsona, air hazard issues against each of the three applicants, and the standard comparative issue.[1] By Memorandum Opinion and Order, FCC 82M-1103, released April 7, 1982, a transmitter site availability issue was added against Family.

2. In an Initial Decision (*I.D.*), FCC 82D-62, released September 9, 1982, Administrative Law Judge (ALJ) Edward J. Kuhlmann granted the Family application. After concluding that Family had demonstrated it is financially qualified and has a transmitter site available that will not pose a hazard to air navigation, the ALJ held it was comparatively the best applicant. Specifically, under the ALJ's comparative analysis: (a) Zaba received a substantial diversification demerit because it already is the licensee of Station WZBS-AM in Ponce, Puerto Rico, which is the proposed community of license in the instant proceeding; (b) Family received a substantial preference over the other applicants for its superior quantitative and qualitative integration proposal; and (c) Marsona received very slight preferences for its proposed coverage and auxiliary power which failed to overcome Family's substantial integration preference, and Zaba received a very slight comparative coverage preference which was deemed to be decisionally insignificant.[2]

3. The proceeding is now before the Review Board on exceptions by Zaba and Marsona to the ALJ's favorable resolution of the Family financial and site availability issues as well as his choice of that applicant under the comparative issue. Replies were filed by Family and the Mass Media Bureau. The Board has reviewed the I.D. in

[1] The application of Ivanhoe Broadcasting Corporation (File No. BPH-800626AA), which was also designated for hearing, was subsequently dismissed at the applicant's request. *Memorandum Opinion and Order*, FCC 82M-1610, released May 20, 1982.

[2] The air hazard and limited financial qualifications issues against Marsona and the air navigation hazard issue against Zaba were resolved favorably to the applicants by summary decision. Memorandum Opinion and Orders, FCC 82M-1104 and FCC 82M-1610, released April 7 and May 20, 1982, respectively. No exceptions have been taken to these rulings and therefore no further discussion of them is warranted.

light of the exceptions and reply briefs and our examination of the record.[3] We adopt the findings of fact in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the Family application will best serve the public interest, convenience and necessity.

4. *Financial Issue.* This issue was designated to determine whether Family has available additional funds over and above its existing capital ($42,500) which it requires to meet its costs of $164,500 for construction and three months of operation. The ALJ found that Family has available $114,390 in net proceeds from a $125,000 loan from Bayamon Federal Savings plus $56,000 in cash that Family partners Jose and Judith Ortiz have on deposit with Bayamon Federal. *I.D.*, paras. 3–5, 20. Since the funds available ($170,390) exceed Family's costs ($164,500), the ALJ concluded that Family is financially qualified. *Id.*, para. 20.

5. In their exceptions, Marsona and Zaba urge that the ALJ erred in considering Mr. Ortiz's testimony that he had $81,000 on deposit with Bayamon Federal because Family's proffered post-hearing amendment of June 21, 1982, which reflects the availability of these funds, was rejected by the ALJ and therefore Mr. Ortiz's testimony varies in this regard from the Family application. We disagree because we believe the ALJ erred in not accepting Family's conforming amendment.

6. The actual existence and availability of the $81,000 deposit is undisputed. Jose Noguera, senior vice president of Bayamon Federal, who was cross-examined as to the availability of the $125,000 loan, also testified upon cross-examination that Mr. Ortiz had an $81,000 certificate of deposit with that financial institution. Tr. 64–65. Mr. Ortiz then confirmed on both direct and cross-examination that he had $81,000 on deposit, that not more than $25,000 of that amount would be needed as collateral, and that the remainder would be available to help finance the station. Tr. 102–03, 116–17, 122. One month after the hearing, Family proffered its amendment containing an updated FCC Form 301, Section III, p. 2 and a balance sheet reflecting the existence of the $81,000 cash deposit. However, the ALJ denied Family's petition for leave to amend as untimely and disruptive of the proceeding. Memorandum Opinion and Order, FCC 82M-2089, released July 6, 1982. We cannot agree with this assessment. Our review of the amendment merely indicates that it would have conformed the application to the testimonial evidence,[4]

[3] Oral argument was not requested, and the Board believes that such argument would not materially assist it in the resolution of this case.

[4] The amended FCC Form 301 page shows $56,000 available in existing capital and indicates that $117,000 was available in loans whereas the ALJ determined the correct figure to be $114,390. The slight difference in loan proceeds is not significant here because the lower figure plus the $56,000 available is more than

would not have required further cross-examination since both Mr. Noguera and Mr. Ortiz had already been fully cross-examined on this specific issue, and therefore would not have been disruptive. This case is thus clearly distinguishable from *North American Broadcasting Co., Inc.*, 21 FCC 2d 631 (Rev. Bd. 1970), relied on by Marsona, where the post-hearing amendment attempted to repair weaknesses in the applicant's financial showing revealed at the hearing and made significant changes in its financial and transmitter site plans with no opportunity for cross-examination by the other parties. Furthermore, since financial qualification is a basic qualifying issue, Commission precedent squarely holds that acceptance of the amendment would not have prejudiced the other applicants. *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981). Finally, while Family could have acted with greater diligence, the Commission has made clear that this factor is not controlling where the amendment is intended to cure a disqualifying defect. *Id.* Therefore, we conclude that good cause existed for acceptance of the amendment and we reverse the ALJ's ruling rejecting it. *See Gross Broadcasting Co.*, 46 RR 2d 1091, 1097–99 (1979); *Bison City Television 49 Limited Partnership*, 91 FCC 2d 26 (Rev. Bd. 1982); and *Gilbert Broadcasting Corp.*, 68 FCC 2d 186, 207–08 (Rev. Bd. 1978), *rev'd on other grounds*, 52 RR 2d 429 (1982); *Ultravision Broadcasting Co.*, 11 FCC 2d 394, 399–400 (Rev. Bd. 1968), *review denied*, FCC 68–1078, October 30, 1968, *aff'd sub nom. WEBR* v. *FCC*, 420 F.2d 158 (D.C. Cir. 1969). Accordingly, since Family was properly credited in the *I.D.* with sufficient funds to cover its costs, we affirm the ALJ's conclusion that it is financially qualified.

7. *Transmitter Site Availability Issue.* In a petition to enlarge issues, filed January 6, 1982, Marsona alleged that Family lacked permission of the land owner to use its proposed antenna site. Family responded that Marsona was referring to an incorrect location and submitted a land owner's affidavit to demonstrate the availability of its site. Marsona replied that Family was in error because it had improperly plotted its coordinates. Since the coordinates specified would place the site on land Family had not shown was available, the ALJ designated an issue to determine whether Family "has reasonable assurance of a transmitter site." Memorandum Opinion and Order, FCC 82M-1103, released April 7, 1982. Family then hired an independent engineering consultant who determined that the original coordinates were inaccurate and computed corrected coordinates for the transmitter site in late April 1982. Family Exh. 6. Family filed a petition for leave to amend on May 14, 1982 reporting the corrected coordinates and, after finding

sufficient to meet the applicant's costs. And the $56,000 is precisely the amount that Mr. Ortiz stated would be available out of the $81,000, after subtracting the amount needed for collateral.

that no actual change in site had occurred and that no party was disadvantaged by the amendment, the ALJ granted the petition. Memorandum Opinion and Order, FCC 82M-1868, released June 15, 1982. In the *I.D.* (paras. 6–7, 21), the ALJ found that the redrawn coordinates place the transmitter at the originally designated site and that therefore Family's proposed site was available.

8. In their exceptions, Marsona and Zaba claim that the ALJ erred in permitting Family to amend its transmitter site coordinates and in resolving favorably to Family the transmitter site issue. They argue that Family was put on notice by Marsona's January 6, 1982 enlargement petition that its originally-proposed geographical coordinates were located on land that it did not have permission to use and that, consequently, Family lacked due diligence because it should have "foreseen" the need to file its amendment earlier than May 14, which was 128 days after Marsona's filing. We disagree. Family did not actually know until late April 1982 that it had made a mistake in its originally-specified coordinates. Previously, it had believed in good faith that it was Marsona who was mistaken as to the location of the site and had submitted a land owner's affidavit to demonstrate that its proposed site was indeed available. After the addition of the transmitter site availability issue against it on April 7, Family promptly commissioned an independent engineering study which resulted in its May 14 amendment reporting corrected coordinates for its originally-proposed site. We conclude that Family's actions in this regard were diligent. *See Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982).[5] And we do not believe that Family could have foreseen that its original engineering exhibit had specified erroneous geographical coordinates. Finally, since no new site was specified, there was no undue disruption to the hearing or prejudice to the other parties. In view of the circumstances, Family's proposed site has always been available to it and the ALJ correctly resolved the site availability issue in its favor.[6]

Comparative Issue

9. *Diversification of Control of the Media of Mass Communications.* Neither Family nor Marsona was found to have any attributable media ownership interests. *I.D.*, paras. 9, 22.[7] Zaba, on the other

[5] *Midwest St. Louis, Inc.*, 79 FCC 2d 519 (1980) and *WMGS, Inc.*, 14 FCC 2d 428 (Rev. Bd. 1976), relied on by Marsona, are easily distinguishable as being examples of an extreme lack of due diligence (delays of one year and two years, respectively).

[6] Although we have treated this exception as a *de minimis* engineering matter because no new engineering showing was involved—only the correction of typographical errors—the Board could easily have, perhaps should have, construed this tiff as "much ado about nothing." *Reding Broadcasting Co.*, 69 FCC 2d 2201, 2207 (Rev. Bd. 1978).

[7] Marsona principal Amaury Santiago Bonilla owns 9.5% of the stock of the licensee of AM broadcast station WBMJ, San Juan, Puerto Rico, but has promised to divest

hand, is the licensee of WZBS-AM in Ponce, Puerto Rico, and was therefore given a substantial diversification demerit. *Id.* The ALJ characterized the diversification preference awarded Family and Marsona as "clear" (*id.*, para. 22) which in this proceeding we equate with "substantial" because Zaba's Station WZBS-AM is located within the proposed community of license. *See Nuance Corp.*, 85 FCC 2d 412, 420 (Rev. Bd. 1981), *review denied*, FCC 81–473, October 1, 1981.

10. *Integration of Ownership and Management.* Family was credited for the proposed full-time integration of Jose Juan Ortiz, a 51% partner in Family, as general manager of the station, his wife Judith Mendez de Ortiz, a 40% partner, as operations/traffic director, and his daughter Bessy A. Ortiz, a 9% partner, as sales director. *I.D.*, paras. 10–11, 23, 26, 31. This integration proposal was qualitatively enhanced by the commitment of the partners to move to Ponce if the application is granted, Mr. Ortiz's broadcast experience, and by the status of Mrs. & Ms. Ortiz as female owners who will be integrated full time into management of the station. *Id.*

11. In its exceptions, Marsona claims that no integration credit should be awarded for the participation of the Ortiz women because they have no broadcast experience and only minimal knowledge of what their duties will involve, and therefore they will not be realistically integrated into station operations. We disagree. These exceptions are purely speculative and fail to address Family's uncontroverted proposal that these women serve in managerial roles. While it is clear that the women are inexperienced in broadcast matters they nevertheless testified forthrightly and specifically regarding their anticipated roles and there is no other evidence that undermines this testimony. *See* Tr. 162, 173–4. Neither lack of broadcast experience nor absence of nonbroadcast experience is relevant to proposed quantitative integration. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951–52 (Rev. Bd. 1982). Moreover, the Commission views the qualitative attribute of previous broadcast experience as of "only minor significance because it is remedial and thus only confers an initial advantage and because emphasis upon experience could discourage qualified newcomers to broadcasting." *Id.* at 952; *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). There is no reason not to apply in this case the Commission's implicit presumption that newcomers are trainable in broadcasting. And there simply is no record evidence that demonstrates that the Ortiz women cannot or will not assume their proposed managerial roles at the station.

12. Zaba was awarded no integration credit because it did not propose to integrate any of its principals into management of the

himself of that interest if Marsona's application is granted. *Id. See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 427 (1981) (divestiture accomplishes the goal of diversification which is the diffusion of ownership and control of the mass media).

station. *I.D.*, paras. 12, 23, 26, 31. In fact, Zaba stipulated on the record that it "will seek no integration credit for any of [its] principals" (Tr. 24). In its exceptions, however, Zaba seeks some credit for the local residence and civic participation of its principals. Local residence and civic participation are not separate comparative criteria but are enhancements only to an integration proposal. *Policy Statement, supra*, 1 FCC 2d at 395–96; *Merrimack Valley Broadcasting, Inc.*, FCC 82R-71, paras. 10–15, released December 8, 1982 (Rev. Bd.). Thus, having no integration proposal, Zaba cannot receive even qualitative credit and its exception is hereby denied.[8]

13. Marsona was credited for proposing to integrate 46% owner Angel I. Fonfrias, Jr., as full-time general manager and sales manager of the station and 8% owner Alejandro Luciano Lugo as part-time (twenty hours) chief engineer. *I.D.*, paras. 14, 15, 24, 26, 31. The ALJ also considered 46% owner Amaury Santiago Bonilla's proposal to work full time at the station as an advisor to the general manager/sales manager and accorded it no integration credit. *Id.*, paras. 12, 25, 26. Marsona excepts and claims that it should have been awarded full-time integration credit for Mr. Santiago Bonilla. We disagree.

14. Marsona proposed generally that "Mr. Santiago [Bonilla], Mr. Luciano, and Mr. Fonfrias, will determine the day to day programming, make decisions, and direct the operation of Marsona's station." Marsona Exh. 6, p. 1. More specifically, Marsona stated that "Mr. Santiago [Bonilla] proposes to be employed full-time at Marsona's proposed station in Ponce as president/treasurer/and adviser to the general manager/sales manager." Marsona Exh. 2, p. 3. Because Santiago Bonilla has had prior broadcast experience as "manager" of Station WRSJ, San Juan, with "responsibility for all operations in the radio station" and as "sales manager" of Station WBMJ, San Juan (*id*, p. 2), it is inferred that he understands the distinction between a managerial and an advisory role. At hearing, he testified that he would be "advisor to the general manager" (Tr. 217) and that his

> personal interpretation of advisor is if I have total knowledge of doing something and somebody is working for me or with me in a particular situation, this person will obviously need assistance from [me].
>
> So, I will devote 40 hours and more if needed to the operation of Marsona station

[8] Insofar as Zaba also argues that two of its stockholders, Huberto Zayas Chardon and Rene Bartolomei, who are local residents (Chardon is civically active), propose to spend some time on station affairs—two hours per day, six days per week each (Zaba Exhs. 1–3), we note that their functions are not described as managerial. Even if they were, such a proposal would entitle Zaba to no more than a slight residual credit, which is decisionally insignificant in this proceeding. *See Policy Statement, supra*; *Peoples Broadcasting Corp.*, FCC 83R-5, n.34, released January 25, 1983 (Rev. Bd.); *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494–95 (Rev. Bd. 1979).

advising and assisting Mr. Fonfrias on all of these operations, the daily basis, we will be there every day.

And all other major management decisions will be taken care by the boards of directors. [Tr. 236.]

15. Generally, "consultative positions will be given no weight." *Policy Statement, supra*, 1 FCC 2d at 395. In the case at bar, the evidence manifestly shows that Santiago Bonilla's managerial responsibilities would be primarily consultative and advisory and fails to distinguish how much time, if any, he would devote to true managerial responsibilities as opposed to merely consultative duties. Moreover, in view of the fact that Mr. Bonilla will (1) continue to reside "an hour and 20 minutes" from Ponce (Tr. 240), (2) will continue to spend substantial time (15–20 hours per week, Tr. 236) in his present advertising business, and (3) did not explain the discrepancies in his proposed time allotment, grant of full-time integration credit would be inconsistent with precedent. *See Deep South Radio, Inc.*, 46 RR 2d 1657 (1980) (slight credit awarded); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969); *cf. Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd.), *recon. denied*, FCC 82R-75, released December 14, 1982 (slight credit only awarded for part-time management involvement). Thus, Santiago will be awarded slight credit only for his proposal. Overall, Marsona is credited with 46% full-time integration for Mr. Fonfrias, 8% part-time integration for Mr. Lugo, and a slight credit for Mr. Santiago Bonilla.

16. In sum, Family, which has been credited with 100% full-time integration and qualitative enhancements for its principals' proposal to move to Ponce, female ownership integration, and Mr. Ortiz's broadcast experience, is awarded a substantial integration preference over both Marsona, which has been credited with 46% full-time and 8% part-time integration plus a slight credit for Santiago Bonilla's participation as an "advisor" plus qualitative enhancements for the broadcast experience of its principals, and Zaba, which has been given no integration credit. *See generally Muncie Broadcasting Corp.*, 89 FCC 2d 123, 134 (100% full-time integrated applicant given substantial preference over applicant with 39.86% full-time integration), *recon. denied*, 89 FCC 2d 1331 (Rev. Bd. 1982); *cf. WHW Enterprises, Inc.*, 89 FCC 2d 799, 827 (Rev. Bd. 1982) (100% vs. 66 2;3% difference in full-time integration merits moderate preference); *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1094–95 (Rev. Bd. 1982) (55% vs. 30% difference merits moderate preference). Marsona, in turn, is given a moderate integration preference over Zaba. *See East St. Louis Broadcasting Co., Inc.*, 29 FCC 2d 170, 173–75 (1971) (34.59% vs. 5.59% difference merits moderate preference); *Nuance Corp., supra*, 85 FCC 2d at 419 (26.6% vs. 0% difference merits moderate preference).

17. *Comparative Coverage.* The ALJ found that Family would

provide primary service (1.0 mV/m contour coverage) to 411,594 persons within 1,015 square miles, Zaba would serve 592,306 persons within 1,156 square miles, and Marsona would serve 550,570 persons within 1,022 square miles. *I.D.*, paras. 16, 28. Because all of the population proposed to be served by each of the applicants already receives five or more primary aural services both day and night, the ALJ awarded Zaba a very slight comparative coverage preference over Family and Marsona and gave Marsona a very slight comparative coverage preference over Family. *Id.*, paras. 17–18, 28–29. Marsona and Zaba both except and seek larger preferences. We affirm the degree of preference awarded by the ALJ because precedent plainly establishes that comparative coverage differences are not of substantial importance in determining best practicable service to the public where primary aural services are already abundant throughout the proposed service areas. *See Simon Geller*, 90 FCC 2d 250, 276 (1982); *WVOC, Inc.*, 45 FCC 2d 420, 423–24 (Rev. Bd. 1974); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647 (Rev. Bd. 1973), *review denied*, 45 FCC 2d 390 (1974); *aff'd without opinion*, 511 F.2d 448 (D.C. Cir. 1975); *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 775 (Rev. Bd. 1970), *review denied*, 27 FCC 2d 61 (1971).

18. *Auxiliary Power.* Marsona excepts to the ALJ's award to it of only some credit for proposing auxiliary power (*see I.D.*, paras. 30, 31) and claims that in Puerto Rico in particular "it is extremely important to have an emergency power generator." Marsona Br. at 18. This argument is unsubstantiated. *See The News-Sun Broadcasting Co., supra*, 24 FCC 2d at 778 (rejecting a similar argument made regarding the State of Maine). The magnitude of the preference awarded by the ALJ comports with precedent and will be affirmed. *See Addendum to Policy Statement*, 2 FCC 2d 667 (1966); *Gilbert Group, Inc.*, 88 FCC 2d 401, 406–07 (Rev. Bd. 1981) (very slight preference awarded), *review denied*, FCC 82–228, released May 18, 1982.

19. *Final Comparative Evaluation.* Family and Marsona have been awarded a substantial diversification preference over Zaba. Family also has a substantial integration preference over both Marsona and Zaba. Marsona has a moderate integration preference over Zaba and very slight preferences for comparative coverage over Family and for auxiliary power over both Family and Zaba. Zaba has a very slight preference for comparative coverage over both Family and Marsona. Because "[d]iversification is a factor of primary significance," *Policy Statement*, *supra*, 1 FCC 2d at 394, and integration is a "factor . . . of substantial importance" in determining best practicable service, *id.* at 395, Family, which has substantial preferences for both over Zaba and a substantial preference for integration over Marsona, is the preferred applicant. Marsona, which is preferred over Zaba on the integration factor, is in second

place. We therefore conclude that a grant of the Family application will best serve the public interest, convenience, and necessity.

20. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed on February 4, 1983 by Marsona Broadcasting Corporation IS GRANTED, and the amendment IS ACCEPTED; and

21. IT IS FURTHER ORDERED, That the application of Jose J. Ortiz, Judith Mendez de Ortiz, and Bessy A. Ortiz d/b/a Family Broadcasting Group (File No. BPH-800925AA) IS GRANTED; and that the applications of Zaba Radio Corporation (File No. BPH-800930AD) and Marsona Broadcasting Corporation (File No. BPH-801003AJ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL *Member, Review Board*

FCC 82D–62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Jose J. Ortiz, Judith Mendez de Ortiz and Bessy A. Ortiz, d/b/a	
FAMILY BROADCASTING GROUP Ponce, Puerto Rico	BC Docket No. 81–808 File No. BPH-800925AA
ZABA RADIO CORPORATION Ponce, Puerto Rico	BC Docket No. 81–809 File No. BPH-800930AD
MARSONA BROADCASTING CORPORATION Ponce, Puerto Rico	BC Docket No. 81–810 File No. BPH-801003AJ
For Construction Permit for a New FM Station	

Appearances

Joseph M. Morrissey on behalf of Family Broadcasting Group; *Francis E. Fletcher, Jr.*, *William P. Bernton*, and *Paul Korman* on behalf of Zaba Radio Corporation; *Gary S. Smithwick* on behalf of Marsona Broadcasting Corporation and *Allan Moskowitz* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: September 1, 1982; Released: September 9, 1982)

1. On November 10, 1981, in an Order of Designation[1] the Chief, Broadcast Bureau, acting pursuant to delegated authority, designated for hearing the above listed mutually exclusive applications for FM Channel 266, Ponce, Puerto Rico. The following issues were considered at the hearing:[2]

1. To determine with respect to Family:

[1] 46 Fed. Reg. 59631, published December 7, 1981.

[2] The designation order included an issue about Marsona Broadcasting Corporation's financial qualifications but summary decision was granted on that issue on April 6, 1982. *Memorandum Opinion and Order*, FCC 82M-1104, released April 7, 1982. In addition, Ivanhoe Broadcasting Corporation's application was dismissed at its request. *Memorandum Opinion and Order*, FCC 82M-1610, released May 20, 1982.

a. The source and availability of additional funds over and above the $42,500 indicated; and

b. Whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that a hazard to air navigation would occur as a result of the tower height(s) and location(s) proposed by Family Broadcasting Group, Zaba Radio Corporation and Marsona Broadcasting Corporation.[3]

3. To determine whether Family Broadcasting Group has reasonable assurance of a transmitter site and, in light of the evidence adduced, whether it is technically qualified to be a licensee.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. On February 1, 1982 a prehearing conference was held. Hearing sessions were held on May 25 and 26, 1982. On July 2, 1982, all parties filed proposed findings of fact and conclusions of law and, on July 21, 1982, reply findings were filed by Marsona and Family.

FINDINGS OF FACT

3. *Family Broadcasting Group's Financial Qualifications*: Family projects a need for $164,500 to meet the cost of construction and three months of operation. In part, to meet this requirement, Family intends to borrow $125,000 from Bayamon Federal Savings. The conditions of the loan from Bayamon and the ability and willingness of Family to satisfy the conditions are the subject of this issue. Jose Noguera, Senior Vice President of Bayamon Federal Savings, explained that the loan repayment would be as follows: The payments would be semi-annual, the first payment would include only interest and become due six months after disbursement of the loan, the lending rate would be the Federal Home Loan Corporation auction rate on the day of the closing (currently 16.25 to 17.25 percent) and an additional origination fee of 4 percent of the amount borrowed would be charged. Tr. 32, 33, 34, 58–60, 68–69.

4. Jose J. Ortiz, a 51 percent partner of Family, stated that Family intended to borrow $66,000, three months prior to beginning operation. Tr. 113. However, he explained that, although he intended to use his own funds initially, he might borrow the full $125,000. Tr. 117–118.

5. Mr. Noguera testified that the bank had reviewed Mr. Ortiz's proposed collateral and considered it sufficient to secure the loan. Tr.

[3] Marsona Broadcasting and Zaba Radio Corporation were granted summary decision on the hazard to air navigation issue. *Memorandum Opinion and Order*, FCC 82M-1104, released April 7, 1982; *Memorandum Opinion and Order*, FCC 82M-1610, released May 20, 1982.

49–51, 53–54, 57, 58. Mr. Ortiz has $81,000 on deposit with Bayamon Federal Savings. Mr. Noguera stated that possibly $25,000 of this amount may be needed as collateral, but most likely it would not. Tr. 73, 116, 122. Jose Ortiz and his wife, Judith Mendez de Ortiz, have agreed to provide the collateral which the bank requires. Tr. 114, 116, 122, 168.

6. *The Availability of Family's Tower Site*: This issue has now resolved into a mistake in Family's engineering coordinates. Before new coordinates were submitted by Family, its coordinates failed to locate its proposed transmitter site. Instead, the transmitter site, if plotted according to the coordinates listed in the application, was located 658 feet away, on land which Family had not demonstrated was available. See *Memorandum Opinion and Order*, FCC 82M-0832, released March 15, 1982; *Order*, FCC 82M-1103, released April 7, 1982; and *Memorandum Opinion and Order*, FCC 82M-1868, released June 15, 1982.

7. Family undertook a new engineering study which found that the original coordinates were inaccurate. Tr. 80–86. The coordinates were redrawn and submitted. Family Exhibit 6. The new coordinates place the transmitter at the originally designated, and available, site. *Id.*; Tr. 84, 86, 95, 123.

8. *Air Hazard Issue*: The Federal Aviation Administration, a party to this proceeding, determined that Family's proposed tower construction, at its corrected site location, would not be a hazard to air navigation. Family Exhibit 8.

9. *Diversification of the Media of Mass Communications*: Neither Family Broadcasting Group, nor any of its principals, have any media interests. Family Exhibit 1 at 1. Marsona Broadcasting has no media interests, but its 46 percent stockholder, Amaury Santiago Bonilla, owns 9.5 percent of the stock of Radio Rock/Mid-Ocean Broadcasting Corporation, which is the licensee of standard broadcast station WBMJ, San Juan, Puerto Rico. Marsona Exhibit 5 at 1. Mr. Santiago Bonilla stated he would divest himself of his interest if Marsona's application is granted. Marsona Exhibit 5 at 1.[4] Zaba Radio Corporation is the licensee of WZBS-AM, Ponce, Puerto Rico. Zaba and its stockholders have no other media interest. Zaba Exhibit 7.

10. *Integration of Ownership and Management*: Jose Juan Ortiz, a 51 percent partner in Family, is proposed as Family's full-time general manager. Family Exhibit 1. Judith Mendez de Ortiz, a 40 percent Family partner, is proposed as the full-time operations/traffic director of the station. *Id.* Bessy A. Ortiz, a 9 percent partner, is proposed as the full-time sales director of the station. *Id.*

[4] Mr. Santiago Bonilla testified that he was having difficulty selling his interest. Tr. 30. No findings will be made about this problem, since there is no question about his willingness to do so. If a grant is made to Marsona, it would be conditioned on Mr. Santiago Bonilla's divestiture of his stock.

None of the partners live in Ponce but they will move there if their application is granted.

11. The only Family partner that has broadcast experience is Mr. Ortiz. He worked in broadcasting from 1959–1977. Family Exhibit 2. His broadcast experience includes announcing, sales and management positions, such as the director of news, music, and programming. *Id.*

12. Zaba does not propose to integrate any of its principals. Tr. 24. Marsona proposes that Amaury Santiago Bonilla, the president, treasurer, and 46 percent owner of Marsona, would work full-time at the station as an advisor to the general manager/sales manager. Marsona Exhibit 2 at 3; Marsona Exhibit 6 at 1; Tr. 217. The position of "advisor" was made by oral understanding. Tr. 219. Mr. Santiago Bonilla would receive no salary, although Mr. Fonfrias, who is an owner and would work full-time, would receive $1,000 a month. Tr. 225–226. The position of advisor was described by Mr. Santiago Bonilla as one of advising and assisting—a sharing of knowledge. Tr. 236. Mr. Santiago Bonilla will not live in Ponce and he will continue to work at the Sales Promoters Corporation for 15 to 20 hours per week. Tr. 235, 236.

13. Mr. Santiago Bonilla worked as a manager of a standard broadcast station, WKJB, Mayaguez, Puerto Rico from 1973 to 1974; he was sales manager at WQBS, San Juan, Puerto Rico in 1974; from 1974 to 1976, he was manager of WRSJ, San Juan, Puerto Rico; and from 1976 to 1981, he was sales manager and vice president of WBMJ, San Juan. Marsona Exhibit 2 at 2–3.

14. Marsona proposes that Angel I. Fonfrias, Jr., who is vice president, secretary, and a 46 percent owner of Marsona, would be the full-time general manager and sales manager of the station. Marsona Exhibit 6 at 1. Mr. Fonfrias produced a weekly radio show on WKVM, San Juan, from 1951 to 1952, and a television show on WIPR-TV, San Juan, from 1964 to 1965. Marsona Exhibit 4 at 1.

15. Alejandro Luciano Lugo, who is vice president and an 8 percent owner of Marsona, proposes to work part-time (20 hours) at the station as the chief engineer. Marsona Exhibit 3 at 1; Marsona Exhibit 5 at 2. He has worked as a broadcast engineer at various radio and television stations since 1975. Marsona Exhibit 3. Currently, he is the chief engineer at WBMJ, San Juan. *Id.*

16. *Coverage Comparison*: Since the applicants propose different sites and HAATs, there would be differences in the location and size of their primary service (1.0 mV/m) contours. The areas and populations involved are tabulated below (Joint Exhibit 1 at 1–3):

	Primary Service	
Applicant	*Area sq. mi.*	*Population*
Family	1,015	411,594

Applicant	*Primary Service* Area sq. mi.	Population
Zaba	1,156	592,306
Marsona	1,022	550,570
Zaba over Family	141 (13.9%)	180,712 (43.9%)
Zaba over Marsona	134 (13.1%)	41,736 (7.6%)
Marsona over Family	7 (0.7%)	138,976 (33.8%)

17. There are five or more primary aural broadcast services available to the proposed uncommon service areas both day and night. Supplement to Joint Exhibit 1 at 2.

18. In establishing the primary aural services presently available to the proposed uncommon areas, the following stations were considered (Supplement to Joint Exhibit 2 at 4–5):

Call	*Location*	*Facilities*	
WOYE-FM	Mayaguez, P.R.	Ch. 231B, 25 kW,	1960 feet
WRPC	San German, P.R.	Ch. 236B, 25 kW,	1970 feet
WAEL-FM	Maricao, P.R.	Ch. 241B, 9.9 kW,	2011 feet
WPRM-FM	San Juan, P.R.	Ch. 253B, 25 kW	1910 feet
WKJB-FM	Mayaguez, P.R.	Ch. 256B, 15 kW,	1973 feet
WZAR	Ponce, P.R.	Ch. 270B, 14 kW,	1590 feet
WERR	Utuando, P.R.	Ch. 281B, 50 kW,	710 feet
WKAQ-FM	San Juan, P.R.	Ch. 284B, 50 kW	1120 feet
WKVM-FM	San Juan, P.R.	Ch. 289B, 50 kW	1100 feet
WXRF-FM	Guayama, P.R.	Ch. 295B, 50 kW	-240 feet

19. *Auxiliary Power*: Only Marsona has proposed auxiliary power in order that it might remain on the air when its normal power supply is interrupted. Marsona Exhibit 7.

CONCLUSIONS OF LAW

20. *Family's Qualifications*: Family Broadcasting has demonstrated that it is financially and technically qualified. Family requires $164,500 to construct and operate for three months. To meet this amount, it intends to borrow $124,000 from Bayamon Federal Savings. The various letters from Bayamon promising to lend that amount were incomplete about the terms of the loan. The hearing testimony demonstrates that the bank will not require any principal payment during the construction and initial operating period but that interest of $5,610 and an initiation fee of $5,000 will have to be paid. When these payments are deducted, Family will have $114,390 of the loan left to apply to its construction and operation needs. Mr. and Mrs. Ortiz have stated that they will provide the collateral the bank requires, which will leave them with $56,000 in cash. The cash

and the loan will give Family $170,390, an amount that exceeds its needs.

21. Family's engineering application is also now correct. Family originally designated a transmitter site that did not match the site location indicated by its coordinates. Family, in checking its engineering, discovered that it had incorrectly computed its coordinates. After recomputation, the coordinates now locate the geographical site originally designated as Family's transmitter location. The FAA has reviewed the site and states that it will not be a hazard to air navigation.

22. *Diversification of the Mass Media*: With these issues resolved, all the applicants have demonstrated that they are qualified and the case becomes one of comparison. Zaba already operates an AM facility in Ponce and, therefore, it must receive a substantial demerit on diversification of the media. One of Marsona Broadcasting's principal stockholders, Amaury Santiago Bonilla, has an interest in a San Juan AM station, but he has promised to divest; thus, Marsona has no media interests. Family and its partners have no media interests. Therefore, Family and Marsona warrant a clear preference over Zaba on diversification of the media.

23. *Integration of Management and Ownership*: Zaba does not propose any integration of management and ownership. Family is a partnership made up of three family members, Jose Juan Ortiz, his wife, Judith Mendez de Ortiz and Mr. Ortiz's daughter, Bessy A. Ortiz. Mr. Ortiz, a 51 percent partner, is the proposed full-time general manager; Judith Ortiz, a 40 percent partner, is the proposed full-time operations/traffic director; and Bessy Ortiz, a 9 percent partner, is the proposed full-time sales director. Mr. Ortiz has broadcast experience and all three of the Ortizes have promised to move to Ponce if a grant is made. Family is 100 percent integrated and 49 percent of the owners are women.

24. Marsona proposes that Angel I. Fronfrias, Jr., who is an officer and 46 percent owner, would be the full-time general manager and sales manager. Mr. Fronfrias has had a little radio and television programming experience, but it was nearly twenty years ago. Alejandro Luciano Lugo, who is an officer and 8 percent owner of Marsona, is proposed as the part-time (20 hours) chief engineer. Mr. Luciano Lugo is currently a station engineer and he has worked at a number of radio stations as an engineer.

25. Amaury Santiago Bonilla is a 46 percent stockholder, president and treasurer of Marsona. He proposes to be the full-time advisor to the station manager. His duties were stated to be those of advising and assisting, which he said he would do without any salary. The Commission in assessing integration proposals looks to the positions which participating owners will occupy, "in order to determine the extent of their policy functions and the likelihood of their playing important roles in management." *Policy Statement on*

Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395 (1965). Particular weight is accorded to staff positions held by owners, although positions of less responsibility are considered. *Id.* "Merely consultative positions will be given no weight." *Id.* See *Deep South Radio, Inc.*, 71 F.C.C. 2d 138, 141 (Review Bd. 1979). Mr. Santiago Bonilla was asked at the hearing to define his position but he failed to expand on his title, except to say that he would advise the station manager. His position will not be accorded any weight, therefore, because the *Policy Statement* specifically provides that no weight should be given to advisory positions.

26. Thus, on the basis of integration of management and ownership, Family, which proposes 100% integration, local residence, female ownership and an owner-manager with broadcast experience, receives a substantial preference. Zaba receives no integration credit since it does not propose any. Marsona receives credit for the 46 percent full-time integration of Mr. Fonfrias and the 8 percent part-time integration of Mr. Luciano Lugo. However, Marsona's integrated stockholders do not propose to move to Ponce like Family's do and only Mr. Luciano Lugo, who would be integrated part-time, has had broadcast experience that enhances Marsona's qualitative proposal. Since Mr. Santiago Bonilla is not going to hold a position that is managerial, his broadcast experience is of no importance.[5]

27. *Comparative Coverage*: Each applicant seeks a permit to construct an FM broadcast station on Channel 266B. Family proposes to operate with an antenna whose center of radiation would be at a height above average terrain (HAAT) of -46 feet. Zaba's HAAT would be 363 feet and Marsona's HAAT would be 203 feet. Each proposes to operate with a power of 50 kW.

28. Since the applicants propose different sites and HAATs, there would be differences in the location and size of their primary service (1.0 mV/m) contours. The areas and populations involved are tabulated below:

	Primary Service	
Applicant	*Area sq. mi.*	*Population*
Family	1,015	411,594
Zaba	1,156	592,306
Marsona	2.022	550,570

29. Zaba's proposed operation would have a 43.9 percent population advantage over Family's and a 7.6 percent population advantage

[5] Marsona and Family have sought preferences because their owners are Hispanic-Americans. On this factor they are equal, however, since 100% of both applicants are Hispanic. Only if Zaba were a serious contender, would this factor have meaning in this case.

over Marsona's. Marsona's proposed operation would have a 33.8 percent population advantage over Family's. However, all of the population involved already has five or more available primary aural services both day and night. Consequently, Zaba's and Marsona's comparative coverage advantage over Family, and Zaba's comparative coverage advantage over Marsona, merit only very slight preferences. *WVOC, Inc.*, 45 F.C.C. 2d 420, 424 (1974).

30. Marsona "is also entitled to some credit for proposing an auxiliary power source (see *Addendum to Policy Statement*, 2 F.C.C. 2d 667, 6 RR 2d 861 (1966)), but such a preference is intrinsically of less significance than other aspects of the comparative analysis." *WVOC, Inc.*, 45 F.C.C. 2d at 424.

CONCLUSION

31. Zaba proposes no integration and it already owns another radio facility in Ponce; therefore, its application is of no comparative significance despite its very slight coverage advantage. Neither Family nor Marsona have media interests. However, there are significant differences between their integration proposals. Family receives credit for its proposed full-time integration of all its partners into management. In addition, all of the Family partners will move to Ponce, one has broadcast experience, and two of the three partners, representing 49 percent of the partnership, are women. Marsona proposes less than half as much full-time integration as Family, and that person, although integrated full-time, does not intend to live in Ponce and he has no current broadcast experience. Thus, Family is entitled to a substantial preference over the other applicants for its superior quantitative and qualitative integration proposal. While Marsona is entitled to a very slight preference for its proposed coverage and a preference for its proposed auxiliary power, these preferences do not overcome Family's substantial preference on the significant criterion of integration.

ACCORDINGLY, IT IS ORDERED that the application of Family Broadcasting Group (File No. BPH-800925AA) for a construction permit for 101.1 MHz on Channel 266, Ponce, Puerto Rico IS GRANTED and the applications of Zaba Radio Corporation (File No. BPH-800930AD) and Marsona Broadcasting Corporation (File No. BPH-801003AJ) ARE DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN *Administrative Law Judge*

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Reconsideration, Petition for, Denial of

Petition for reconsideration of *George E. Cameron Jr. Communications* (KROQ), FCC 82R-58, 91 FCC 2d 870, denied.
–*George E. Cameron Jr. Communications*
Docket No. 20629

FCC 83R–20

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GEORGE E. CAMERON JR. COMMUNICATIONS (KROQ) Burbank, California	Docket No. 20629 File No. BR-2724
For Renewal of License	
ROYCE INTERNATIONAL BROADCASTING COMPANY Burbank, California	BC Docket No. 79–65 File No. BP-20,111
BAKER-SMITH COMMUNICATIONS, INC. Burbank, California	BC Docket No. 79–66 File No. BP-20,191
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted: March 14, 1983; Released: March 23, 1983)

BY THE REVIEW BOARD:

1. In a Decision released on September 24, 1982 (FCC 82R-58, 91 FCC 2d 870) (hereinafter "*Decision*, at para. ___ "), this Board affirmed the ALJ (Initial Decision, FCC 82D-6, 89 FCC 2d 1279, (hereinafter "*I.D.*") and found that the incumbent licensee, George E. Cameron Jr. Communications ("GECC"), was not qualified for renewal of the license of standard broadcast station KROQ and granted the license instead to the competing applicant, Royce International Broadcasting Co. ("Royce").[1] Since the issuance of its

[1] Baker-Smith Communications, Inc. has been eliminated from the proceeding. *Decision*, at para. 2.

Decision, the Board has been cascaded with new pleadings, which we reckon as follows in footnote[2], below.

PETITIONS FOR RECONSIDERATION

GECC

2. It has been long held that reconsideration will not be granted "merely for the purpose of again debating matters on which the [deciding body] has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, *aff'd sub nom. Loraine Journal Cov. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). And, Royce is correct that the standard for reconsideration is:

> . . . manifest error or omissions so material that their corrections will result in substantial alterations of the original decision.

Royce Opposition to Supplement to Petition for Reconsideration, at p. 2 (citing *WWIZ, supra*, 37 FCC at 686). It is also true that many of the theories and arguments here urged by petitioners for reconsideration are merely a battology of plaints already rehearsed before the ALJ and once again in the Board's prior review. Nonetheless, because petitioners here assert factual errors in the Initial Decision and in the Board's *Decision*, challenge the *Decision's* legal premises, and particularly because the consequence of nonrenewal has such a profound impact on the licensee, we shall hereinbelow address the relevant arguments raised by the petitioners. As the ALJ and the

[2] (a) Petition for reconsideration, filed October 25, 1982, by Kenneth J. Roberts; (b) opposition to (a) and (h), filed October 29, 1982, by San Marco; (c) opposition to (a) and (h), filed November 4, 1982, by A.W.A.R.E.; (d) opposition to (a) and (h), filed November 9, 1982, by the Mass Media Bureau; (e) motion to accept late-filed opposition to (a) and (h), filed November 9, 1982, by Royce; (f) opposition to (a) and (h), filed November 9, 1982, by Royce; (f) opposition to (a) and (h), filed November 9, 1982, by Royce; (g) reply to (b), (c), (d) and (f), filed November 19, 1982, by Roberts; (h) petition for reconsideration, filed October 25, 1982, by GECC; (i) motion for leave to file a supplement to (h), filed November 10, 1982, by GECC; (j) supplement to (h), filed November 10, 1982, by GECC; (k) request for oral argument filed November 10, 1982, by GECC; (1) opposition to (i), filed November 17, 1982, by the Mass Media Bureau; (m) opposition to (i), filed November 16, 1982, by Royce; (n) reply to (b), (c), (d) and (f), filed November 19, 1982, by GECC; (o) opposition to (i) and (k), filed November 22, 1982, by San Marco; (p) rely to (1), (m) and (o), filed November 29, 1982, by GECC; (q) reply to (o), filed November 29, 1982, by GECC; (r) opposition to (j), filed December 27, 1982, by Royce; (s) opposition to (j), filed December 27, 1982, by San Marco; (t) opposition to (j), filed December 28, 1982, by Royce; (u) opposition to (j), filed December 27, 1982, by the Mass Media Burea; and (v) reply to (r), (s), (t) and (u), filed January 4, 1983, by GECC; (x) petition to reopen record and to enlarge issues, filed November 5, 1982, by GECC; (y) opposition to (x), filed December 1, 1982, by Royce; (z) opposition to (x), filed December 2, 1982, by the Mass Media Bureau; (aa) reply to (y) and (z), filed December 10, 1982, by GECC; (bb) further petition to reopen record and to enlarge issues, filed December 17, 1982, by GECC; (cc) opposition to (bb), filed January 20, 1983, by Royce; and (dd) reply to (cc), filed January 28, by GECC.

Board did previously, we will examine GECC's conduct on an issue-by-issue basis as those issues were designated by the Commission.

3. *Ineptness.* GECC does not generally deny that a multitude of violations of the Commission's rules took place under its stewardship of KROQ.[3] And, in seeking to identify the reasons for the serious problems at the station, the Commission designated a specific issue:

> To determine whether carelessness, ineptness or disputes among the principals evidence an inability on the part of George E. Cameron Jr. Communications and Burbank Broadcasting Company to effectively exercise the responsibilities of a licensee of Station KROQ and KROQ(FM), respectively, affecting their basic and/or comparative qualifications. [*Designation Order*, 67 FCC 2d 143, at 147–148 (1977).]

In assessing the evidence under that issue, we noted that the analytical standard thereunder was whether the applicant's conduct was marked by a "pattern of carelessness and inadvertence" on relevant matters of major significance, *citing Edward G. Atsinger, III*, 29 FCC 2d 443, 447 (Rev. Bd. 1971); *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 75 (1970). *Decision*, at para. 18. After reviewing at length the chronology of events at KROQ, the estrangement of the licensee principals from their licensed duties and the myriad violations that ensued, *id.*, at paras. 5–39, we were compelled to affirm the ALJ's conclusion that GECC was inept and almost literally "careless" in complying with its licensed responsibilities.[4]

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[3] "No one denies that there were difficulties encountered and mistakes made in the early years of KROQ. . . ." GECC Petition for Reconsideration (hereinafter "GECC Petition"), at p. 1. Kenneth J. Roberts, currently a 49% owner of the licensee (*Decision*, at para. 32), has separately petitioned for reconsideration but does not "address here the multi-pronged basis for disqualification of the renewal applicant found by the Board with respect to the so-called ineptness, technical, reporting, and misrepresentation issues," leaving the other GECC principals to fend for themselves on the deficiencies. Roberts Petition for Reconsideration (hereinafter "Roberts Petition"), at p. 2. Rather, it is Roberts' purpose not to argue that the derelictions never occurred but to distance himself from the other principals of GECC. Hence, Roberts summarizes his grievance thusly (*id.*, at p. 3):

> One of the distinguishing and disturbing features of the Board's *Decision* is its failure to adequately set in time the various acts of omission and commission attributed to GECC and to relate those acts to the position of Roberts *vis-a-vis* GECC over the course of time that he was involved with the corporation. The impression is projected, therefore, that Roberts shares all of the pre-1976 derelictions of GECC set out in the *Decision* as if he were an original stockholder of the corporation.

[4] In iterating the atmosphere in which KROQ was run, we examined the testimony of numerous GECC principals. *Decision*, at paras. 6–12. GECC urges, correctly, that a transcript miscitation attributes certain testimony of one GECC principal, Neil Visser, to another, Dr. Manuel de J. Castillo. GECC Supplement to Petition for Reconsideration (hereinafter "GECC Supplement"), at pp. 3–4. While the Board regrets the misattribution, it is certainly non-decisional since the balance of the record overwhelmingly affirms that the GECC principals showed insufficient awareness of, and care for, their public interest responsibilities (*i.e.*, their responsibility to keep the station on the air, to file required reports, to maintain

4. GECC's defenses to the adverse finding under the ineptitude issue, like common law defenses of yore, are somewhat inconsistent and a bit scrambled. As best we discern them, they are: (1) that the principals were not inept; (2) that even if they were inept before 1977, the ineptitude inquiry is wrongly focused on the pre-designation period rather than the post-designation conduct of the licensee; (3) that GECC did not show carelessness in delegating its public interest responsibilities to the hired staff since Commission policy permits such delegation; (4) that the causal ineptitude leading to KROQ's downfall was not the ineptitude of GECC but the ineptitude of counsel in organizing GECC as a partnership rather than a corporation; and, (5) that ineptitude is not a disqualifying offense.

5. As noted, GECC does not contest strenuously on reconsideration that many rule violations marked KROQ's record. Rather, with respect to its numerous reporting violations, for example, GECC states that these were "not characterized by an intentional concealment or misrepresentation."[5] As another illustration, and with respect to its technical violations, it claims that "[t]here was no degree of willfulness in any of the alleged deficiencies nor was any effort made to conceal the violations."[6] Hence, on the one hand, GECC argues that its violations were not willful.[7] And yet, under the ineptitude issue, it apparently argues that its violations were not caused by carelessness or disputes among the partners. One thing is certain: KROQ's record is riddled with violations, many of a very

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technical standards, to be fully forthcoming as to their financial position with respect to the FM application, to maintain *de facto* control over the station) and that they subordinated these public duties to concern for their individual financial jeopardy.

[5] GECC Petition, at p. 8.

[6] *Id.*, at p. 11. This tergiversation is characteristic of GECC's entire approach to its record. Thus, while GECC will go only so far as to depict its technical violations, for example, as "alleged," it seeks credit in the same sentence for not concealing them.

[7] While not important to the outcome of this case, we believe that GECC's definition of "willful" may be at odds with the definition used by the Commission. Indeed, to clarify, Congress recently amended Section 312 of the Communications Act of 1934 (47 U.S.C. § 312) as follows:

* * *

(f) For purposes of this section:

(1) The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

See Public Law 97–259. In the Conference Report [caccompanying H.R. 3239], Congress explained that it was merely conforming the statute to the Commission's consistent definition, *citing Midwest Radio Television, Inc.*, 45 FCC 1137 (1963). *See* Rep. No. 97–765, 97th Cong., 2d Sess. 51 (1982).

serious nature, and we reiterate our prior view that in affirming the ALJ's holding that GECC was merely inept at complying with FCC standards we might have used "genteel understatement." *Decision*, at para. 18. Not satisfied, and presumably arguing that its multiple violations were neither willful *nor* careless (it does not apparently contest "repeated"), GECC claims throughout that its violations were simply the result of an unarticulated "financial situation."[8] But, with respect to that vague "financial situation," GECC is all over the lot. To wit, in contesting the Board's holding that GECC lacked candor by overstating its financial abilities in 1973 when applying for an additional station (*see Decision*, at paras. 40–45), it quibbles that the Board erred in finding that KROQ was then in the midst of a "deep financial decline" and it disputes the Board view that GECC was advised by its general manager that its financial situation was "perilous."[9] In that connection, GECC intimates that it was not terribly concerned about its faltering finances when applying for a second station because, no matter what, it could always rely upon the bottomless pockets of "Kenneth Roberts who both the ALJ and the Board found sufficient by himself to render GECC and BBC financially qualified in this proceeding."[10] Similarly, GECC takes issue with the findings of the ALJ and the Board that after October 1973, the GECC principals were either unwilling or unable to financially support the station. It declaims: "many of the principals contributed vast amounts of . . . money to assist the station"[11]; "[a]nd, contrary to the Board's belief, principals did continue to contribute . . . money to the station following the October 11, 1973 meeting."[12]

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[8] *See, e.g., GECC Petition*, at p. 9, where it goes so far as to claim that even its failure to file Annual Financial Reports (Forms 324) from 1974–1978 until 1980 was a result of its "unfortunate financial situation." We are puzzled because, unless GECC had already done many of the calculations necessary to complete Form 324, it could scarcely know with certainty how "unfortunate" its situation was.

[9] *See* GECC Supplement, at pp. 9–10. Actually the term used by the general manager was "somewhat bleak." *Id.* For the objective financial situation, *see Decision*, at para. 40; *see also* paras. 17–19, *infra*. Likewise, GECC chides the Board for attributing KROQ's perceived financial crises in any part to a "commercial failure" of a 1972 rock concert because "the station was not anticipating a short-run 'commercial' success but was using the concert as a promotional device." GECC Supplement, at n. 2 (Tr. citation omitted). Yet, last time around, GECC claimed that "[s]everal major factors contributed to the problems which confronted the licensees" and that "[o]ne such factor was the financial loss incurred by the station in sponsoring and promoting a rock concert. . . ." GECC Joint Exceptions and Appeal, at p. 29.

[10] GECC Supplement, at p. 9. Furthermore, in arguing its financial strength in connection with its FM application, it contends that it submitted and relied upon the balance sheet of Roberts, GECC Petition, at p. 14, and that it "*was* (and is) financially qualified due to Kenneth Roberts' unquestioned ability to fulfill commitments." *Id.*, at p. 15 (emphasis in original.).

[11] GECC Supplement, at p. 3.

[12] *Id.*, at 4. *But see I.D.*, paras. 21–22 (and transcript citations therein). We do

6. Given the fact that GECC submits that its original principals were indeed willing and able to support the station and, in any contingency, cushioned by the ample reserves of its latter principal, Roberts, it is not precisely clear just what "financial situation" GECC blames for its myriad violations.[13] Nonetheless, even if GECC's ambiguously referenced "financial situation"[14] was partly responsible for its derelictions, GECC would not necessarily be excused from complying with Commission rules without a timely showing that the difficulties arose from circumstances "beyond its control" or "not attributable to a disproportionate allocation of resources to [KROQ-FM] rather than a lack of resources to satisfy [KROQ-AM's] commitment." *West Coast Media, Inc.*, 79 FCC 2d 610, 621 (1980), *aff'd West Coast Media, Inc.* v. *FCC*, No. 81–1548, released December 7, 1982 (D.C. Cir.)[15]

7. GECC next argues that the ALJ and the Board misperceived

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acknowledge that some contributions were made by principals other than Roberts after October 11, 1973. *See, e.g.*, Tr. 1562–63; 1646–47 However, it is not clear here whether GECC is arguing that it had sufficient financial resources or that it hadn't. Some of the circumstances of these later contributions are discussed *infra*, para. 24, in connection with GECC's lack of candor in applying for an FM station in 1973.

[13] In addition to laying the blame for its violations to its never-described "financial situation," it also blames several sets of counsel (see, *e.g.*, GECC Petition, at p. 16; GECC Supplement, at p. 7) and even, *mirabile dictu*, the Commission itself (*see, e.g.*, GECC Supplement, at p. 7, where it is contended: "Because GECC's main objective, at the insistence of the Commission, was to resume broadcasting, the stations went back on the air without being as technically prepared as they would have preferred"; *see also* GECC Petition, at p. 7).

[14] Despite GECC's equivocating adversions to a "financial situation" and its current implication that its principals were willing to fund the station at a level where it would comply with FCC rules, we adhere to our conclusion that many of the licensee's "financial problems" were self-imposed in that—in the main—the principals simply refused to fund the station at compliant operating levels, or, for a time, at any operating level at all. That much is admitted in the Roberts Petition where it is ceded:

> The [other GECC] stockholders were apparently not prepared or unable to cooperate with one another to run the station harmoniously, keep it on the air, and deal with the Commission as a unit. [*Id.*, at p. 15.]
>
> * * *
>
> The stockholders refusal to expose each of themselves to personal bankruptcy and full liability for all of the debts of the corporation resulted in the dissipation of virtually all of the assets of the station so that broadcast service was rendered difficult, if not impossible, to resume. [*Id.*, at pp. 15–16.]

See also I.D., paras. 21–27 (and transcript citations therein); paras. 18–24, *infra*.

[15] It will be recalled that notwithstanding KROQ-AM's "somewhat bleak" financial picture and its organizational contretemps in 1973 (*see Decision*, at paras. 9–13, 40), the principals of GECC nonetheless prosecuted contemporaneously an application for an FM station which also collapsed for lack of licensee support in the summer of 1974. Just how much additional financial burden the FM acquisition put on the GECC principals is not reflected in the record.

the purpose of the Commission's 1977 designation of an ineptness issue and erred when they considered pre-1977 conduct.[16] In suggesting that the Commission intended to virtually ignore GECC's past conduct and to focus entirely on conduct *after* the license had been set (for the second time) for a renewal hearing, GECC would turn upside-down the well-established principle that conduct *post litem motam* is not the best index of future reliability. Reflecting the instruction of the court in *Office of Communications of the United Church of Christ* v. *FCC*,[17] the Commission has refused to give much weight to post-designation improvements, explaining its policy as follows:

> This policy is rooted in the common sense proposition that enforcement of the public interest obligation of broadcasters cannot be meaningful if licensees are free to perform inadequately during their franchise period, secure in the knowledge that post-term efforts would guarantee renewal if a challenge should ever be mounted. Indeed, if we routinely allowed evidence of 'upgrading' to save broadcast licenses that would otherwise not be renewed, we would expect to find potential competitors for the frequency hesitant to file a competing application because all would recognize that protracted litigation will give the licensee ample time to improve his performance.

Alabama Educational Television Commission, et al., 50 FCC 2d 461, 477 (1975); *see also Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1421–26 (1978), *recon. denied*, 71 FCC 2d 416 (1979).[18] Moreover, our prior decision in this case *did not* necessarily focus on the pre-1977 period in coming to an overall conclusion that GECC

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[16] GECC Supplement, at p. 7, where it is postulated:

> The Commission was acutely aware of the pre-1977 conduct which now forms the basis for the ALJ's conclusion that GECC should be disqualified on 'ineptness' grounds. While not condoning that conduct, the Commission clearly was focusing on GECC's *future* reliability—a matter virtually ignored by the ALJ. [Emphasis in original.]

[17] 359 F.2d 994, 1007 (D.C. Cir. 1966). The court there stated:

> . . . although in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion. When performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant . . . must literally 'run on his record.'

[18] Therein, the Commission repeated its policy:

> To permit belated improvements in a licensee's performance as a general matter would also undermine the basis of the Commission's enforcement system. As a practical matter the FCC cannot rely on enforcement actions to make certain that our licensees operate in accordance with our rules. Our system is based to a great extent on voluntary compliance. If we were to permit all licensees to receive credit for 'corrective' actions taken after the Commission has investigated them, our system would break down. Even if we permitted only 'one free bite of the apple,' with over 9,000 licensees such a policy would make a mockery of broadcast regulation. [69 FCC 2d at 1424.]

was, at the very least, inept, careless, or impaired by disputes among its principals insofar as assuring compliance with Commission rules and standards. Indeed, many of GECC's rule violations occurred after, and continued into, the post-designation period. *See, e.g., Decision*, at paras. 19–20 (reporting violations) and para. 22 ("ten Official Notices of Violations [of technical rules] between August 1976 and April 1979"). Although it is correct that a renewal hearing is not punitive but predictive, it is the licensee's past record upon which those predictions are based. *Office of Communications of the United Church of Christ, supra.* We may not disregard that record.

8. Relying on *Alabama Educational Television Commission* and *University of Pennsylvania, supra*, GECC next insists that it was not inept or careless in delegating its responsibilities to its hired staff and that, even in the cited cases where an absence of requisite licensee control was found, "those licensees were not—as the licensee is here—disqualified from being licensees."[19] GECC's reliance on those two cases is incredibly misplaced. First, the Commission in those cases (where both licensees were—in fact—denied renewal of their licenses) did not condone the delegation of basic licensee responsibility to staff agents. To the contrary, in *University of Pennsylvania* the Commission repeated the doctrine of *Continental Broadcasting Company*[20] and rejected the view:

> . . . that a licensee who delegates to persons it deems responsible, authority to operate and manage a station cannot be held responsible for their activities if it is unaware of them. This is, of course, a completely untenable view. *Retention of effective control by a licensee of the station's management and operation is a fundamental obligation of the licensee, and a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control.*

69 FCC 2d at 1397 (footnote deleted; emphasis in original). As reflected in our *Decision* (at paras. 7–8), not one of the GECC

[19] GECC Petition, at p. 6. GECC's reading of *Alabama Educational Television Commission* and *University of Pennsylvania* is bizzare. In both cases, the licenses at issue were *not* renewed because the Commission could not find that a renewal would serve the public interest. *See*, respectively, 50 FCC 2d at 477, 478; 69 FCC 2d at 1430. Nor were the licensees given short-term renewals. In the extraordinary situation in the *Alabama* case involving the state educational authority, the Commission waived 47 CFR § 1.519 (denied license applicant may not refile for 1 year) and permitted the state authority to file new applications *along with the other competing applicants.* 50 FCC 2d at 478. In the *Pennsylvania* case, the Commission merely allowed the university to seek waiver of § 1.519 and specifically invited competing applicants. 69 FCC 2d at 1430 n. 79. In neither of the above cases was there a competing applicant. Because there is a qualified applicant in this case, we need not speculate as to whether the Commission would grant a waiver of § 1.519 to GECC and allow it to refile its application in less than one year.

[20] 15 FCC 2d 120, 126 (1968), *recon. denied*, 17 FCC 2d 485 (1969), *aff'd sub nom. Continental Broadcasting, Inc.* v. *FCC*, 439 F.2d 580 (D.C. Cir.), *cert. denied*, 403 U.S. 905 (1971).

principals even alleged much familiarity with the FCC's rules, regulations, or policies, nor did they assume responsibility for complying with the Commission's standards.[21] *See also, I.D.*, paras. 9–13, Conclusions, paras. 3–6. This is not merely delegation, but a lack of care and ineptitude in meeting licensee responsibilities. More germane, however, to GECC's inexplicable reliance on *Alabama Educational Television Commission* and *University of Pennsylvania*,

[21] Typifying this abyss was the testimony of GECC's (BBC's) original president, Jack Gonsalves:

Q. Did you have any responsibility for programming of the station?

A. No, sir.

Q. Did you have any responsibility for engineering at the station?

A. No.

Q. Did you have any responsibility for setting operating policy for the station?

A. No, sir.

Q. Did you have any responsibility for determining whether the public file was up to date?

A. No, sir.

Q. Did you have any responsibility for insuring that the Federal Communications Commission's rules and regulations were followed?

A. No, sir.

Q. Were you aware of what the Federal Communications Commission's rules required of a radio station?

A. Well, the only thing that I know that they required was that, when—before we got the station, we made a survey, and I went around making part of the survey. That was one thing I knew they needed. [Tr. 2333.]

* * *

Q. As President of BBC, did you ask to see the books and records of the Company.

A. No.

Q. Were they made available to you?

A. Well, I never did ask to see them. They were never brought and say, here, do you want to look at them.

Q. Did you receive regular reports as to the financial condition of the Company?

A. No.

Q. Did you receive any kind of reports as to the condition of the Company, either its technical operations or its programming?

A. No. [Tr. 2335.]

To the identical effect is the testimony of Neil Visser who took over as president in 1973. *See* Tr. 1768–69, 1779, 1781–85. Likewise is the testimony of Dr. Castillo who was president and managing partner from 1975 to 1979. *See, e.g.*, Tr. 1664–65.

is that whereas those cases turned on the designated issue of "Abdication of Control," we specifically stated in our *Decision* that the ineptitude issue designated by the Commission in 1977 was somewhat different.[22] As we explained, our reference to the above-cited cases was merely to state the standard of ultimate licensee responsibility and then to examine the licensee's conduct to determine whether (in the words of the *Designation Order*) "carelessness, ineptnes or disputes among the principals" inhibited GECC's ability to meet its licensee responsibilities. *Decision*, at para. 18. We found therein that the ALJ was manifestly correct in his conclusion under the ineptitude issue. Even *after* 1977, GECC could not comply with rudimentary rules.

9. On reconsideration, GECC once again advances its chief defense that the operative ineptitude at the core of its non-compliance is not its own but that of its organizing counsel which constituted GECC as a partnership rather than a corporation. It argues, in essence, that its principals would have stayed the course, not battled and sued each other into paralysis, and would have adequately supported the station had they but the personal shield of corporate immunity.[23] Nonetheless, and while counsel's failure to incorporate GECC no doubt created deep financial anxiety for its individual principals, a licensee's organization structure is irrele-

[22] *See Decision*, at n.5 ("no 'Abdication of Control' issue . . . [and] we do not intend to add to, or change, the designated issues.")

[23] *See, e.g.*, GECC Petition, at pp. 3–4; GECC Supplement, at pp. 2, 4. However, it is not clear that the GECC principals were completely unaware of potential personal liability for at least some debts. For example, Gary Bookasta testified that GECC's original (1972) purchase of the station was conditioned "on the basis that each and everyone of the stockholders personally guarantee that $1,700,000 note [to the estate of the late George E. Cameron]." Tr. 1132. Several of the principals also "individually guaranteed" a later note (or notes) to Valley National Bank (*see* note 47, *infra*) to help offset losses from the 1972 rock concert. Tr. 1155–56; Bur. Exh. 10. Additionally, GECC's (BBC's) original 1972 application (FCC Form 315) for the acquisition of the station indicated that BCC was a partnership. FCC Form 315 (Bur. Exh. 1), Section I, p. 5. The application was signed by E.H. Bookasta as "General Partner," *id.*, at p. 6; specified again that it was a "general partnership," *id.*, at Section II, p. 1; listed all the principals as "general partners," *id.*, at Section II, p. 3; and contained signed certifications from each principal that they attested to the application, *id.*, Section I, p. 5. We recognize that BBC, the partnership, later in 1972, transferred its equipment to a wholly-owned subsidiary, GECC (Bur. Exh. 3), and that GECC became the actual licensee of KROQ (FCC Form 323 filed August 2, 1972) (Bur. Exh. 6). And, we further recognize that in spite of being advised by counsel in 1972 that BBC was a "general partnership" (Bur. Exh. 7), many GECC principals believed that they had "corporate immunity" or that their lawyers would change their status to a corporation. The essence of GECC's "failure of incorporation" defense is that the principals did not fully know what they were getting into. We agree. *See Decision*, at paras. 5–18, 53; *I.D.*, paras. 9–39, Conclusions, paras. 3–25. However, *somebody* was required to take responsibility for the operations of a powerful broadcast station in the Los Angeles market: that "somebody" was the licensee.

vant to its duty to comply with Commission standards. As we observed previously (*Decision* at para. 53), the Commission does not have differential standards of licensee conduct depending on organizational form; nor is it pertinent here that the basis for GECC's collective disintegration is that its liabilities began to exceed the amounts the principals had originally agreed to venture in the KROQ enterprise[24] or that the principals were unanimously advised by their individual lawyers that the best way to protect themselves from further loss "was to put no more funds into the stations until such time as a practical solution of increasing revenues and cutting expenses, as well as paying off existing obligations could be found."[25] It is obvious of course, that the Commission cannot compel licensee principals to invest more than they wish (or can afford); it is just as obvious that a licensee cannot neglect its basic public interest responsibilities, violate rules *ad infinitum*, and sit on a license for several years merely because it is not a corporation or because its principals—fearful of personal liability—cannot agree on whether and how to support the collapsing station. GECC's failure to become incorporated, through act of counsel or otherwise, is not a pertinent public interest concern. Once the partnership ruptured and the principals decided in 1973 that they wanted no further liability for the station nor would they invest the necessary capital in the station, one proper course would have been to have sold the station forthwith (even if at a loss) or turned the license back to the FCC.[26]

10. Finally, GECC urges that the ineptitude issue has never been found to be an independent ground for disqualification for renewal,

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[24] Thus, GECC has framed its claim (that "the most significant factor" contributing to its debacle was the failure of its counsel to incorporate) in these terms:

> The failure is particularly significant because the members were all under the impression that they were buying stock in a corporation, and that accordingly their liability would be limited to their initial investments, and that responsibility for operating losses would be that of the corporation. [GECC Joint Exceptions and Appeal, at p. 30.]

[25] *Id.*, at p. 31.

[26] We note, in passing, that competing applications for the GECC (BBC) licenses were not filed until, at least, November 20, 1974. *See Designation Order*, 56 FCC 2d 752 (1975). Further, although unpalatable, federal bankruptcy laws provide for limited relief from creditors where liabilities threaten to consume a debtor. Until the filing of competing applications in November 1974, there was no legal barrier to the sale of KROQ. *See* discussion of *Second Thursday Corp.*, *infra*, para. 54. Thus, it is not our position that principals must "commit financial suicide to pay homage to some ideal notion that, when one becomes a FCC licensee, one has abandoned all of one's civil rights and may never exit the broadcast business." Roberts Petition, at p. 17. We simply note that many other businesses and individuals, every year, face the tragic personal consequences of a failed enterprise and have no FCC to invoke.

although it does concede that new applicants have been disqualified, at least in part, under the issue.[27] It contends, therefore, that its disqualification under this issue is contrary to precedent. We must disagree for several reasons. First and foremost, the Commission designated the ineptitude issue as a "basic and/or comparative issue" (67 FCC 2d at 148), not simply as a comparative issue. Hence, the Commission must have assumed that GECC might be found basically unqualified under the issue.[28] Second, merely because the Commission has not previously failed to renew a license based on a particular issue does not mean that it is estopped from so doing in the future. Indeed, in a recent case involving a "promise v. performance" issue, a licensee denied a renewal unavailingly made the same argument; but, the court affirmed the Commission. *West Coast Media, Inc.* v. *FCC*, No. 81-1548 (D.C. Cir. 1982), Slip Op. at 10.[29] This same "first time" argument was also made—with similar lack of success—in *Greater Boston Television Corp.* v. *FCC*, 444 F.2nd 841, 859 (D.C. Cir. 1970). There, the late Judge Leventhal speaking for the court (and *citing International Bhd. of Operative Potters* v. *NLRB*, 320 F.2d 757, 761 (D.C. Cir. 1963) opined: "in the evolution of the law of remedies some things are bound to happen for the 'first time'." Even so, GECC points to no case designated on an ineptitude

[27] *See* GECC Petition, at p. 7 & n.5.

[28] GECC even goes so far as to intimate that the principal purpose of the Commission's designation of the license for renewal hearing was as a spur and that, in so doing, it did not intend to make much of its concerns about the licensee's ineptitude GECC states:

> Even though the Commission had full knowledge of GECC's problems, it made no effort to take away GECC's license, and instead urged KROQ to recommence broadcasting. The Commission even set a hearing for renewal of KROQ's license to put time pressure on the licensee to go back on the air. It is patently unfair for the Commission thus to have prompted GECC to put KROQ back on the air (at no small expense to GECC), with full knowledge of the station's problems, and to now say that these same problems now disqualify GECC from being a broadcasting licensee.

GECC Petition, at p. 7. Given the procedural requirements of the Communications Act (*see, e.g.*, 47 U.S.C. §§ 309, 312) and the A.P.A. (*see, e.g.*, 5 U.S.C. § 554–558), it is not clear how the Commission could "take away GECC's license" without setting it for hearing. Furthermore, while the Commission did note that its 1975 designation was intented to have a "cathartic effect" (58 FCC 2d at 624), we must assume that when the Commission redesignated the license for hearing in 1977 to determine whether GECC was qualified to remain a licensee (67 FCC 2d 143 (1977)), it meant business.

[29] There the court stated:

> This case is apparently the first time a license renewal has been denied solely because of a promise-versus-performance failure. Such derelictions in the past have been remedied through fines or short-term renewals. West Coast argues that the Commission did not convincingly explain its decision to impose such a severe sanction.

issue where the facts remotely resemble the record here and where the license was nonetheless issued.[30] We reaffirm the ALJ's conclusion under this issue.

11. *Reporting.* In the Initial Decision, the ALJ (*citing to Designation Order*, 56 FCC 2d at 754–55) laid out the numerous alleged reporting failures of GECC in violation of 47 CFR §§ 1.65, 1.613, 1.615 (*see I.D.*, at paras. 54–60) and found that these were more than mere "technical violations" (*id.*, at Conclusions, para. 14).[31] GECC's defense here is that the reporting violations "do not merit disqualification because they are not characterized by an intentional concealment or misrepresentation."[32] While it is true that an isolated failure to report or even more occasional lapses of reporting requirements are not ordinarily disqualifying unless accompanied by an intent to conceal, *see, e.g., WADECO* v. *FCC*, 628 F.2d 129 (D.C. Cir. 1980); *cf. Fox River Broadcasting, Inc.*, 88 FCC 2d 1133, 1137 (Rev. Bd. 1982), no Commission case holds that a licensee can consistently ignore fundamental reporting requirements with impunity unless a sinister motive is proven. To construct such a categorical rule would be tantamount to authorizing licensees *never* to file a required report so long as, in so doing, they were not prompted by deceit. We believe that GECC paints with too broad a brush and perceive that the facts in this case are clearly more akin to *John C. Roach*, 20 FCC 2d 255 (1969), *aff'g* 20 FCC 2d 260, 273 (ALJ 1968), where continued reporting failures occurred even after the licensee was on notice to comply. Here, even after the licensee was on notice in 1975 as to the significance of its reporting derelictions, GECC Petition, at p. 9, *citing to Designation Order*, 56 FCC 2d at 756, serious failures continued long after that. *See, e.g.,*

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[30] For much the same reason, we find GECC's reliance on *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965) to be off-key. *See, e.g., White Mountain Broadcasting Co., Inc.* v. *FCC*, 598 F.2d 274 (D.C. Cir. 1979) (*Melody Music* patently distinguishable); *Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1982) (*Melody Music* inapposite). Not one case cited by GECC (or to our independent knowledge) is attended by a record *quite* like that in evidence here.

[31] As the ALJ observed, the Commission found that GECC's failures in this regard were so pronounced that, during critical periods when KROQ was off the air, the agency simply did not know who the licensee was or how to communicate with it. *I.D.*, Conclusions, para. 14, *citing to* 56 FCC 2d at 755 where the Commission stated:

> As noted, these reporting failures are indicative of a result of the various disagreements among the partners of BBC. As a result, the Commission's staff has been unable to deal with either BBC or GECC as entities for the past fourteen months. The Commission's files indicate that the telephones at the licensee headquarters have been disconnected and that the mailing address of those headquarters is no longer valid. Staff dealings with the licensee have therefore taken place with individual partners, who at times contradicted each other.

[32] GECC Petition, at p. 8.

I.D., paras. 58–60. Further, as with the ineptitude issue, *supra*, GECC argues that inasmuch as the Commission was aware of the licensee's reporting failures at the time of designation and urged that required report filings be made, this "hardly implies" that the Commission was prepared to disqualify GECC when it designated the reporting issues.[33] This reasoning is circular and frivolous. We believe that GECC's violations, both before and after designation, clearly "establish a pattern of flagrant disregard for our reporting requirements." *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 827 (1982).

12. *Technical.* In our *Decision* (at paras. 22–27) and in the *I.D.* (at paras. 69–77), the number and the seriousness of GECC's technical violations were recounted. Here again, GECC insists that we and the ALJ should have ignored its violative record and "focused primarily on the current state" of KROQ.[34] It states that a current assessment "would demonstrate that GECC is now at least minimally technically qualified and is eager to meet its licensee responsibilities in this regard."[35] It further contends that the ALJ and the Board have "ignored the significant progress" that has been made;[36] that "one of the Commission's own engineers remarked . . . that the transmitter situation was 'vastly improved'" by 1980;[37] and that it "has been working diligently to solve any remaining technical problems."[38]

13. Let us put it this way: GECC has been the licensee of KROQ since 1972. *I.D.*, para. 7. If, in 1982, the most that can be said for GECC's technical compliance is the aforestated, it is conclusively not

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[33] *See* Petition, at 9. Indeed, "disqualify" is hardly the right word. Upon reconsideration of its *Designation Order* in 1976, the Commission noted that GECC's reporting failures were so egregious as to warrant summary dismissal of its application. *See* 58 FCC 2d at 623 where the Commission stated:

> For fourteen months prior to designation of this proceeding for hearing the Commission's staff had been unable to communicate with the KROQ and KROQ(FM) licensees by mail or by telephone, although there were communications with individual principals. According to one of the principals, those individuals who signed the renewal applications were no longer principals, and the renewal applications which had been prepared for submission to the Commission had been intercepted and altered. The applications were subject to dismissal under Rule 1.513 if proper signatures were not affixed. It further appeared that the licensees had not reported to the Commission contracts affecting ownership and control of the facilities, and had not filed timely and accurate financial and ownership reports, as Rule 1.611–1.615 require. Under Rule 1.539, the renewal applications were subject to dismissal for failure to comply with these reporting requirements.

[34] GECC Petition, at p. 9.

[35] *Id.*, at pp. 9–10.

[36] GECC Supplement, at p. 8.

[37] *Id.* In fact, however, after noting that the licensee failed to respond substantively to the January 1980 Notice of Violation within the required 10 days (Tr. 3718), the FCC engineer to whom GECC adverts (D.V. Bosque) testified that the technical operation of KROQ was "very poor" (Tr. 3721) compared to "most other stations" inspected by him (Tr. 3722).

[38] GECC Supplement, at p. 8.

qualified to be a licensee. We will not ignore its atrocious record; even if we consider its "upgraded" record (*i.e.*, from the designation for hearing onward), its technical disqualification is patent. And, having acceded to GECC's urgings that it "was and is" financially qualified (*see* GECC Petition, at p. 15), it cannot blame its violations entirely on that condition: it cannot have it both ways.[39] Finally, we reaffirm that GECC's cumulative technical violations are independently sufficient to warrant disqualification. *See United Broadcasting Co.* v. *FCC*, 565 F.2d 699 (D.C. Cir. 1978). GECC contends that although the *United Broadcasting* court stated that it was relying solely on technical grounds, the court was disingenuous in that case.[40] We cannot be so presumptuous.

14. *False or Misleading Statements re: Application for KROQ-FM.* In designating GECC for a renewal hearing in 1975, the Commission considered the licensee's April 1973 application for a second station, an FM facility, and stated:

> That application contained BBC's 'Statement of Financial Condition' as of April 2, 1973, reflecting total assets in excess of total liabilities by $2 million, and a projected balance sheet for the partnership reflecting assets in excess of liabilities by approximately $3.3 million. Moreover, a revised projected balance sheet filed July 5, 1973 showed BBC's assets in excess of liabilities of approximately $3.7 million. [56 FCC 2d at 756.]

It further stated:

> It therefore appears that in and around the time BBC was representing to the Commission that its financial condition was properly reflected on balance sheets

[39] GECC argues that the Board was in error in assuming that the licensee spent money on the station in 1977, but neglected expenses for technical equipment. It states:

> That is wrong. Not a dime was expended on the carpeting which came to the station in a trade-out arrangement with and advertiser (Tr. 3235). If technical equipment could have been purchased via the same method, presumably it would have been.

GECC Petition, at p. 11 n.8. Apart from the fact that we were merely repeating the lament of GECC's own engineer (*See Decision*, at para. 27), no case holds that technical compliance is contingent on a licensee's ability to "trade-out" for equipment. As admitted by Dr. Castillo (president of GECC from 1975–1979), and despite Roberts' financial support, "many technical violations" continued at KROQ (Tr. 1710) and continue to the present, *see* note 37, *supra*.

[40] *See* GECC Petition, at p. 10, where it speculates:

> While the Court of Appeals did rely on the 'long history of persistent violations of [FCC] rules' as sufficient grounds for disqualification, the facts which gave rise to that case plainly illustrate its inapplicability to the GECC situation. First, at the Commission level, the licensee's abominable record was found to include the illegal broadcast of lottery information and false and misleading advertisements as well as numerous technical violations. *United Television Co.*, 55 FCC 2d 416, 417 (1975). Although the appellate court did not reach the former grounds, it hardly could have ignored such conduct in its evaluation of the licensee's overall reliability. [Footnote omitted.]

showing an excess of assets over liabilities of $2 million, other events indicated that the partnership was in financial trouble. [*Id.*, at 757.]

Accordingly, it specified an issue:

(f) To determine whether (i) Burbank Broadcasting Company made false or misleading statements regarding its financial condition in its application for assignment of license of KROQ(FM), or (ii) failed to maintain that information in an up-to-date fashion pursuant to Section 1.65 of the rules. [*Id.*, at 762.]

15. The ALJ considered the evidence and concluded that GECC's financial showing[41] to the Commission "was essentially a sham";[42] that during the relevant period "BBC and its subsidiary GECC were on the verge of financial collapse";[43] and, that it violated 47 CFR § 1.65 for failure to advise before the grant of the FM application that its financial picture had changed in a decisionally significant manner.[44] The Board considered GECC's exceptions and found that even if the original balance sheet submitted by BBC was "technically accurate,"[45] GECC misled the Commission by failing to notify it of a sharply declining economic position and of a deep financial rupture in the GECC organization.

16. GECC argues here, again, that there was no reliance on its balance sheet and that the balance sheet was submitted only because the Commission required it with the application.[46] It also argues that the Board's characterizations of GECC's financial situation during the summer and fall of 1973 (*see Decision*, at para. 40) are not supported by the record and that the GECC principals were not advised by the general manager that KROQ's financial situation was "perilous."

17. In support of its cause, GECC contends that—contrary to the Board's view—the picture available to the GECC principals in June 1973 was "upbeat, mixed at worst."[47] Without colloquy, we will let

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[41] Actually, the financial showing was that of Burbank Broadcasting Co. ("BBC"), whose principals were identical to that of its subsidiary, GECC.

[42] *I.D.*, Conclusions, para. 19.

[43] *Id.*

[44] *Id.*, para. 20.

[45] The BBC balance sheet showed approximately $5 million in assets and $3 million in liabilities. However, $3.2 million of the purported assets consisted of a $2.6 million demand note from GECC and $600,000 in advances made to GECC. Bur. Exh. 15. These "GECC" asserts were vaporous.

[46] GECC Petition, at p. 14. It is difficult to imagine that the Commission, at that time, would have required an applicant's balance sheet and not relied upon it, even in part. Apparently, however, the Commission believes that it relied upon it. *See* text, *supra*, para. 14 *reprinting Designation Order* text (56 FCC 2d at 756, 757).

[47] GECC Supplement, at pp. 9–10. However, on June 6, 1973, a missive was sent to the GECC principals which read in part:

BURBANK BROADCASTING COMPANY
PERSONAL AND CONFIDENTIAL

June 6, 1973

To The Partners of Burbank Broadcasting Company:

the minutes of the June 16, 1973 meeting of GECC principals speak for themselves. The principals were told:

> Gary Bookasta passed out to members of the board of directors a list of current debts of the station and/or 'company.' We have a note outstanding at Valley National Bank, and they have sued the partners for this obligation. The United Medical $300,000 loan commitment was discussed. Because of the money owned the Bank, etc., we sought a loan from United Medical. However, as we got closer to funding, problems developed that we were not aware of. We are in receipt of a letter from United Medical that they will fund the loan; however, it was never funded as we were led to believe. Because of this suit with Valley, it was suspected that it will be more difficult to get a loan from a lending institution. We need a long term consolidation loan to pay off existing loans, etc.
>
> * * *
>
> [BBC Attorney] *Harvey Fierstein told the group that the status with BBC was critical and foreclosure imminent, for we owed the Government back taxes to the tune of $180,000 and that Valley National Bank had filed suit for the note due*

I am respectfully taking this means of advising you with respect to the present financial posture of Burbank Broadcasting Company and its wholly owned subsidiaries. Our condition at this time is as follows:

A. Outstanding current liabilities, all of which are due or past due.

1. Valley Bank	$180,000.00 (plus interest)
2. Security Bank	$ 24,000.00 (plus interest)
3. Accounts payable	$200,000.00 (approx.)
4. State and Federal Withholding Taxes	$186,000.00

B. Fixed monthly expenses

1. Payroll	$ 60,000.00 (approx.)
2. Pepsico Lease	$ 16,100.00
3. Other expenses (fixed)	$ 20,000.00 (approx.)
4. Estate of George Cameron (beginning July, 1973)	$ 17,000.00

C. Present Income

At the present time, though we are writing orders at a considerably greater rate and amount, our cash billings have just reached $40,000 per month, and we have been averaging 'trade' billings in excess of $20,000 per month. Though this represents a tremendous increase it still (on a cash basis) is short of covering our on-going obligation.

D. Outstanding Obligations

At the present time our outstanding unsecured loans total approximately $1,000,000.00, including, but not limited to, a loan of $500,000 from Ken Roberts and approximately $400,000 from the Visser Brothers. [Bur. Exh. 18.]

> *them.* It was imperative that we get funds to clean up these and other important obligations.
>
> The problem is that we are in an *emergency financial condition* and we need a quick solution if we are to resolve our financial problems.

Partnership Minutes of Meeting of BBC, June 16, 1973. (Bur. Exh. 20, at p. 3; emphasis added.) Although the partnership minutes go on to note that alternative loan sources would be explored, these generally fell through except for a $500,000 loan from Roberts.[48] Considering KROQ's cash flow at that time (*see Decision* at para. 40, *citing I.D.*, para. 67), GECC's failure to entice many institutional lenders to supply the large amounts needed by GECC is hardly surprising.

18. More important, the GECC principals themselves certainly did not view the 1973 financial picture as "upbeat" or "mixed." For example, Jack Gonsalves, the president of GECC until the June 16, 1973 meeting, testified that he was unaware of the heavy debts of GECC and that when he was advised thereof, he and his brother Joe (20% combined owners) immediately resigned. Tr. 2337–2339. Jack Gonsalves, who thought KROQ might be worth more than GECC paid for it, evinced his surprise at being told by KROQ's lawyer in June, 1973 that "we have an obligation of some 3.4 million [dollars] and that the present package is unrealistic against the potential." Tr. 2339–40.[49] Joe A. Gonsalves recalls that after being apprised of the financial picture in June 1973 and advising the other principals that he could not pay in his share of his indebtedness to BBC, he indicated that he was trying to sell his shares through a broadcasting lobbyist in Sacramento. Tr. 2297–99. Thus, the 1973 outlook of the Gonsalves brothers, who owned one-fifth of GECC, was far from optimistic.[50]

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[48] GECC Supplement, at pp. 10–11. For example: "Dr. Castillo spurred an effort to get a $6 million loan from the Commonwealth Bank in the Bahamas and had arranged the transaction only to see it evaporate when the dissident partners contacted the bank. A similar arrangement was discussed with the Lowry Investment Company but was killed following the intervention of the dissidents." *Id.*, at p. 11 (Tr. citations omitted).

[49] KROQ was purchased by GECC for $500,000 down, and $1.7 million over 5 years. *I.D.*, para. 9; Tr. 1430.

[50] Joe Gonsalves' apprehension was reflected in his testimony:

> Q. Can you tell us what took place at that [June 16, 1973] meeting, from your point of view?
>
> A. Well, from my point of view, when they were talking about the amounts of money needed, I first said that I thought I had someone who would buy my interest in the station, and I was told at that meeting that we couldn't sell our interest in the station; that, if we couldn't come up with our share of the money, that we would have to give up our share of our holdings in the station. And I was very willing to do that. And it was at that point, the fact is, I wanted to get out of the station because, when I went into it, it was my understanding from some of the documents that were drafted and what was said to me that at any time that money was needed, that if you couldn't put up your share of the

19. Other GECC principals shared the pessimism of the Gonsalves brothers. For example, Michael Colicigno described his perception of GECC's situation at the pertinent time as follows:

Q. You said before I believe that there were other matters that arose during 1973 which caused some concern to you besides the tax assessment that you just testified to.

A. Yes.

Q. What were the other matters?

A. The other matter was that we had a very high priced operation with a very low income yield. We were, it was costing us $100,000 a month or thereabouts in salaries and services needed by the members of the staff or the radio station, be it electricity, telephones, car rentals, credit cards, rent on the building, the salaries and the like. The income derived which was $20,000, $25,000 a month most of the time it was trade outs and I could see that we had to somehow change the operation somewhere along the line. We were not generating the dollars to take care of the financial responsibility. So, I indicated to Gary that maybe we were just operating at a too high a level. Maybe we should cut down.

Q. This is Gary Bookasta?

A. Yes.

Q. When did you say this to him?

A. Probably in August of 1973.

* * *

Q. From the beginning of the operation of KROQ by Burbank Broadcasting Company, George E. Cameron Communications which was I believe in the middle of 1972.

A. July 22nd, 1972.

Q. Okay. From that time, from the time you began operating the station to the time you first became concerned in August of 1973, was there ever a month where the station operated at a profit?

A. We lost every day, every month from 1972 until the time I became concerned. [Tr. 1435–37.]

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money, you could turn your stock over to the person—to the people who would put up your share of the money and leave. And that's what I wanted to do at that June meeting.

Q. How much money were you asked to put up?

A. I don't recall what it was. But it was more money than I could afford to put up.

Q. It was a substantial amount of money?

A. It was. And I always made it clear when I went in it, I just didn't have the money. I didn't have the income and didn't have the resources to be able to do that. [Tr. 2297–2298]

Joe Gonsalves had previously indicated that the "first real alert [he] had to the financial problems" came when he received the June 6, 1973 missive (*see* note 47, *supra*) to the principals (Tr. 2322); and that it was also probably his first notice that GECC was even acquiring an FM station. Tr. 2323.

20. By November of 1973, the IRS had levied a lien against Colicigno for the still-unpaid FICA withholding taxes in the amount of $177,000 adverted to in the June 6, 1973 letter to GECC principals. *See* note 47 *supra*. Colicigno explained:

> Q. Were you aware in 1973 of whether the station, KROQ-AM, was paying the proper withholding for its employees?
>
> A. I thought we were, yes.
>
> Q. Did there come a time when, did there come a time when you were informed to the contrary?
>
> A. Yes, I did. I was told by Pete Prestininzi that the checks were signed but they were not sent, were not mailed to the government. In other words, everything was done, the bookkeeping was done but the checks were signed but they were held in abeyance because we didn't have the money in the bank to pay them.
>
> Q. When did he tell you this?
>
> A. Right near the time when we began to make some waves about breaking away from the partnership because that was my greatest concern. This is one of the reasons and for no other reason did I try to buy out in 1973. [Tr. 1432–33]

21. Two other GECC principals, Robert L. Goe (5%) and Peter Prestininzi (10%), alleged in December, 1973, that the very purchase of the FM was unauthorized[51] and further complained:

> That prior to the filing of this complaint numerous lawsuits have been filed against the partnership by BARBARA KING (as assignee for Ball, Hunt, Hart & Baerwitz, in the sum of $14,731.00, plus interest; CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA, a corporation, for damages in the sum of $1,541.00; CHANDLER LEASING DIVISION, PEPSICO LEASING CORPORATION, a corporation, for damages in the sum of $767,011.00; VALLEY NATIONAL BANK, Glendale, California, for damages in the sum of $180,000.00, plus interest in the amount of $75,000.00, plus an additional note in the amount of $125,000.00, plus accrued interest and attorneys' fees. There are numerous other threats of litigation. These complaints are not being answered. Plaintiffs are informed that

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[51] *See Complaint of Goe and Prestininzi* (filed against the other GECC principals on Dec. 20, 1973 in the Superior Court of California, L.A. County) (Bur. Exh. 36), at p. 5, where it is asserted:

> The plaintiffs are informed and believe and therefore allege, that some of the defendant partners, but less than a majority of all of the partners, negotiated and entered into an acquisition program for Radio Station KPPC-FM from the NATIONAL SCIENCE NETWORK, INC. Said partners signed and authorized a lease back contract with TOOL RESEARCH ENGINEERING CO. for the sum of $220,000.00 utilizing some corporation assets as security and upon receipt of the funds into the partnership have caused these funds to be disbursed through the partnership to favored creditors and/or designates of some of the defendant partners instead of paid to GEORGE E. CAMERON, JR. COMMUNICATIONS, INC., to liquidate withholding obligations of the corporation to the Internal Revenue Service of the United States.

This question over formal GECC authorization for the FM application was echoed by Joe Gonsalves who testified that he had never approved it. Tr. 2303. His brother, Jack (the president of BBC at the time), knew very little about the FM application himself. Tr. 2345–46.

the attorney for the partnership has not been paid, up to this time, fees in the amount of $5,000.00 and an additional sum of $5,000.00 to his firm and has notified the partnership that he is preparing an application to be relieved as counsel of record in the VALLEY BANK case. [*Complaint of Goe and Prestininzi:fo, supra* note 51, at pp. 5–6]

Prestininzi, who until October 1973 was the treasurer of GECC (Tr. 2393), testified at hearing as follows:

Q. And when did you first become aware of the large number of debts or creditors' claims against Burbank Broadcasting Company and George E. Cameron Communications?

A. Summer of '73.

Q. And what caused you to become aware of those debts and obligations?

A. By reviewing reports.

Q. What reports?

A. Well there were P&L's that were reported to that time. [Tr. 2397]

Prestininzi indicated that although the KROQ general manager held some promise out in June 1973, he didn't believe him (Tr. 2421) and his testimony explains why:

Q. Well, in comparing income to expenses, how—what was the relationship?

A. Our expenses were probably one and half to two times what the income was.

Q. And this is in '72 and '73, on a monthly basis?

A. Yes. [Tr. 2410]

* * *

Q. In '73 isn't it true that George E. Cameron was behind in its payments on its obligations?

A. Yes. [Tr. 2415–16]

22. The ALJ found that by August, 1973, GECC's real assets "were under 1 million while its total liabilities exceeded $3.4" (*I.D.*, para. 67); that, in general, its principals were refusing to come up with the badly needed cash (*id.*, Conclusions, para. 19); and that although GECC made its first monthly payment (of a $1.7 million total it owed) to Bank of America in August, 1973, it thereafter defaulted (*I.D.*, para. 18).[52] On August 31, 1973, GECC agreed to sell

[52] GECC appears to challenge this latter finding, contending:

> Actually the principals did not default on a loan from the Bank of America because there was no such loan. In October, 1973 BBC missed its monthly payment to the Bank *as executor* for the estate of George Cameron to whom the money was owed.

GECC Supplement, at n. 13 (emphasis added; transcript citations omitted). If this datum is material, its significance eludes us. However, we correct our observation in the *Decision*, n. 12, that the amount to be remitted was $2.2 million: the amount was $1.7 million. Bur Exh. 15.

Roberts an option to acquire a 25% interest in BBC (which wholly owned GECC) in exchange for the $600,000 he had already lent BBC (*see Agreement*, Bur. Exh. 29); and Roberts further agreed to lend an additional $100,000, in part, to pay the $51,000 owed to Pepsico and $34,000 in back payments on the $1.7 million Cameron Note (*id.*). However, these loans from Roberts were not enough to stanch the tide of red ink engulfing GECC.

23. By October 11, 1973, the financial situation reached disintegration. Dr. Manuel de J. Castillo, currently the vice president of the company, describes that when the principals found out that they were each personally liable on the massive debts of GECC, and on advice of counsel, they refused to put more money in the station. He testified:

> No, listen to me very carefully. October 11th, 1973, there was a fight in which each member got an attorney. And at that time the attorneys told the members don't put a dime. Remember, I was Secretary and Treasurer. [Tr. 1647]
>
> * * *
>
> The radio station was abandoned by all the attorneys that made their clients completely unable to put any money, even if they wanted to. I went to the Vissers' house, and they wanted to put money. But [attorneys] Degracio and Demetio refused them to put in the money. [Tr. 1652]

Dr. Castillo further recounted:

> I was at the meeting, October 11, 1973, and you saw maybe 80–$800,000 of bills not paid. And the Pepsi Cola bill two months behind, Bank of America bill, three months behind. Therefore, you have to know just a little bit to know how bad you are doing. [Tr. 1656]

While he personally put $235,000 more in the station after October, 1973 (Tr. 1648), even Dr. Castillo stopped in 1976 (Tr. 1649).

24. Neil Visser, a GECC principal, who did contribute $20,000 at the October 11, 1973 meeting (and another $5,000 later), was there elected President of BBC (Tr. 1965); but upon advice of counsel, he resigned almost immediately (id).

Visser stated:

> Q. Your lawyer advised you not to have anything to do with those stations?
>
> A. That is correct.
>
> Q. Did you make any phone calls to people at the station after that or to other partners?
>
> A. No, sir.
>
> Q. Did you write any letters to them about the business?
>
> A. No, sir.
>
> Q. Did you participate in the business in any way?
>
> A. No, sir.
>
> Q. Did you respond to them in these areas?

A. Only when our lawyer would ask us to.

Q. In other words, you did only what your lawyer told you to do?

A. That is correct. [Tr. 1957]

Edith Mitchell, another GECC principal, also contributed some money after the October 11, 1973 confrontation. She explained why:

Q. And my question is when you gave money to Bookasta in '73 you say to meet payroll among other things?

A. Utilities, the telephones were going to be cut off. The utilities were going to be cut off.

Q. Did Gary Bookasta ask you for that money specifically?

A. That is right.

Q. And what did he tell you?

A. Just what I said. It is for payroll, utilities, telephone bills. I stood in line with him at the Pacific Telephone Company one night until 7:00 o'clock to keep the phones from going off. [Tr. 1563]

25. We need not belabor the record any further to confirm the ALJ's perception of GECC's financial plight up to mid-October, 1973. Unaware of any of the foregoing circumstances, the Commission granted the FM license on October 30, 1973. GECC suggests: "The attempts to solve the station's financial problems were dealt a harsh blow when AFTRA called a strike and shut the station down in July, 1974."[53] However, AFTRA's 1974 action was scarcely a *vis proxima* or a bolt from the blue. In fact, no sooner had the Commission granted the FM license in 1973 than AFTRA sent the following telegram to the agency:

TWX PD HOLLYWOOD 12/13/73

FEDERAL COMMUNICATIONS COMMISSION
919 M Street NW (sic)
Washington, DC

Gentlemen

We understand that Burbank Broadcasting Co. owners of Radio Station KROQ in Burbank, Calif., have applications pending for licenses for radio stations KPPC in Pasadena, Calif., KMPX in San Francisco, California.

This is to inform you that payroll checks issued to employees of station KROQ have been returned by the station's bank for insufficient funds. Also the station is in default of its contractual obligation to make payments to the AFTRA pension and welfare funds on behalf of the announcers and the newsmen employed there.

We therefore file a protest to the granting of any further FCC licenses or renewals of licenses to this company and respectfully request an opportunity to be heard on this matter.

Allan H. Davis

[53] GECC Supplement, at p. 4.

Assistant Executive Secretary
American Federation of Television and Radio Artists
(AFTRA) [Bur. Exh. 35]

In light of all of the foregoing, we reaffirm the ALJ's finding that, throughout most of 1973, GECC/BBC maintained a drastically inflated financial picture before the Commission and we find that the licensee is culpable for a misleading lack of candor. We find that there was acute awareness on the part of the GECC principals of the gravity of the financial situation and that its breach of its duty to so inform the Commission during the pendency of the FM application was egregious. GECC's last-ditch defense is that it was not advised by counsel to report its predicament to the Commission, even after the fractious meeting on October 11, 1973.[54] However, *citing Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969), the court recently reminded that the serious failure to report a decisional matter cannot be excused. It stated:

> But 'advice of counsel cannot excuse a clear breach of duty by a licensee.' *Asheboro*, 20 F.C.C. 2d at 3. The client becomes fully responsible at some point, and that point is reached more quickly in practice before the FCC than in courts of law. *E.g.*, *WADECO, Inc.* v. *FCC*, 628 F. 2d at 128; *Lorain Community Broadcasting Co.*, 18 F.C.C. 2d 686, 688 (1969), *aff'd sub nom. Allied Broadcasting, Inc.* v. *FCC*, 435 F. 2d 68 (D.C. Cir. 1970).

RKO General, Inc. v. *FCC*, 670 F. 2d 215, 231 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1974 (1982). GECC's lack of candor here is independently sufficient for disqualification.

26. *Transfer of Control.* It is undisputed—in any significant sense—that since 1974, and assuredly since 1976, Kenneth Roberts has been the mainstay of KROQ and not the majority principals of GECC. The operative question is whether Roberts, in contravention of a stern admonition from the Commission in 1975,[55] assumed *de facto* control of KROQ in violation of 47 U.S.C. § 310. After examining the Initial Decision, the record, and the exceptions, we affirmed the ALJ's adverse findings. *Decision*, paras. 29–39. GECC challenges the previous finding "with a fusillade of easily parried"[56] emissions to the effect that, although Roberts had virtually absolute financial control over the station and virtually all financial responsibility and liability from 1976 on, Roberts never used his financial position to control the station. Thus, for example, GECC asserts:

> Here again, the clear preponderance of the evidence indicates that at *no* time has Roberts taken, or attempted to take, advantage of his financial 'leverage' over the BBC partners. [GECC Petition, at p. 19 (emphasis in original)]

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[54] GECC Supplement, at p. 12.

[55] *See Letter of Chief of Broadcast Bureau*, June 26, 1975, *reprinted* in pertinent part at *I.D.*, para. 41.

[56] *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1091 (1982) (Rev. Bd.).

* * *

There is no evidence that the arms-length nature of Roberts' financial supervision over the stations has changed at all since he became managing partner of BBC and President of GECC in 1979. [*Id.*]

It also claims:

It is equally clear that the financial arrangements entered into between Roberts and the various GECC principals by which he became 49% owner with options to increase his ownership interest to nearly 100%, have not resulted in any exercise of control over the station by Roberts. Roberts never intended to exercise his financial 'leverage' over any of the GECC principals and, in fact, he has not done so. Even since 1979, when Roberts was elected president of GECC and managing partner of BBC as a result of the GECC principals' wish to demonstrate some progress to the station's outside creditors in terms of financial stability, his role has been basically limited to that of a financial adviser. [GECC Supplement, at p. 13 (Tr. citations and footnote omitted).]

27. The record, however, puts the lie to these claims. A good—but far from the singular—illustration of the control arrangement at KROQ is portrayed in the testimony of Dr. Manuel de J. Castillo who was the president of GECC from 1975 (Tr. 1644) until Roberts personally took over as president and managing partner in 1979 (Tr. 1670). Dr. Castillo explained:

Q. After the stations resumed broadcasting 1976 did Ken Roberts give you money to keep the stations operating?

A. The answer is yes, after.

Q. And up until today has he done that?

A. Yes.

Q. And in 1976, in 1977, in 1978, and 1979, when Mr. Roberts would give money to you to keep the stations operating how would he do it? Would he give you one lump sum a month, or would he give you money each week? How did it operate?

A. *That depended how he need it.* [Tr. 1662 (emphasis added).]

He went on:

A. We opened the radio station, and we have some money that we didn't have—you know, we had a special—the people to help us to open the radio station in '76. Now the people get us started, the radio station, and Gary Bookasta started the radio station in '76. I was there, and the other people. He hired the people to open first the AM, after it then the FM. Now Ken when we didn't have enough money to make the payroll at the end of two weeks, then we said, 'Ken, we need about $12,000 or $15,000.' The station makes some money, not enough. Then Ken he said, I want to give you a loan to the radio station through you. Give the loan to me. A city Bank in Beverly Hills in a special account I have for the radio station. I am the financial. Therefore, I make the payroll checks, paid the rent, telephone, and utilities. And that payroll, you know, completely pay off. Sometimes you have to pay more, sometimes less. He put up, in this part, about it would be $60,000, $75,000 in the three years.

Q. So would it be correct to say that you would get money from Ken Roberts from time to time in 1976, '77, '78, '79, and take that money and put it to a station account and pay bills for operating expenses?

A. That would be correct. [1663–64] *See also* Tr. 1650, 1659–61. Moreover, Dr. Castillo did not know exactly how much Roberts had spent on the station (Tr. 1661) and, more particularly, after Dr. Castillo relinquished the presidency to Roberts in 1979. Dr. Castillo responded:

Q. How recently to your knowledge has Mr. Roberts advanced sums to Cameron-Burbank?

A. At the present time I don't know since November 6, 1979, Mr. Roberts is the—the man that is the President of the corporation. I am the Vice President. He signs checks now.

Q. My question is to your knowledge.

A. I say I don't know right now.

Q. You don't know?

A. No, I don't know. The answer is I don't know. [Tr. 1725]

Moreover, Roberts is the first secured creditor of all of the other GECC principals (Tr. 1095), holding liens against the non-broadcast property of some principals (*see, e.g.*, Tr. 1661), and he owns, *inter alia*, the tower and transmitter site (*I.D.*, para 47). Finally, Jose Molina, who has been the station manager since 1978 (Tr. 1828), testified that he has reported to Roberts ever since Roberts took over the presidency from Dr. Castillo in 1979 (Tr. 1835). He had previously reported to Dr. Castillo and (KROQ general manager) Patrick Welch (*id*.).

28. It is evident from the record that, at least since 1976, Roberts' *de facto* control over KROQ has been essentially absolute. This plain fact is tacitly acknowledged by Roberts who desires primarily that a clear dichotomy be drawn on the performance of KROQ from 1976 onward. Roberts Petition at pp. 3–5, 15–16. We recognize the practical predicament Roberts found himself in in 1976. Having invested many millions of dollars in KROQ and being confronted with principals who wanted, at that point, nothing much beyond indemnification, Roberts' reluctance to entrust his fate and the fortune lodged in KROQ to hands of the majority principals after he compensated KROQ creditors and recommenced operations in 1976 evinces obvious, if belated, fiscal prudence on his part.[57] Nonetheless, the law forbids unauthorized assumption of *de facto* control. *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*,

[57] GECC takes issue with the Board's general observation that—in view of Roberts' satisfaction of KROQ's multifarious creditors, his investment of approximately $6 million in the operation, his indemnification of the original principals, and his current options to acquire virtually 100% of the licensee (he now owns a *de jure* 49% interest)—Roberts is the primary individual with any meaningful interest in the fate of KROQ. GECC Supplement, at p. 14. A much more candid depiction, however, was offered by counsel for Roberts who forthrightly stated: "I represent a real party in interest in this proceeding, Mr. Ken Roberts, *who is the real party in interest*, and I coin a phrase." Tr. of Oral Argument, July 9, 1983 (emphasis added). That "coin" is good tender.

50 RR 2d 1346 (1982). And, the Commission has recently indicated that financial dominance remains a valid indicator of *de facto* control. *Cf. Radio WAVS, Inc.*, FCC 82–537, released December 10, 1982, at para. 17. GECC argues that inasmuch as it notified the Commission of the increase of Roberts' *de jure* interest to 49%, "[t]hese actions were hardly those of a licensee transferring control *'sub silentio'*."[58] It further submits: "Here, although an unauthorized *de facto* transfer of control may have occurred, no actual 'control' has ever been exercised by the transferee, who has scrupulously avoided violation of the letter of the Commission's warnings."[59] We know not what to make of the latter claim, which is periphrastic at best; however, it is germane to recall that the issue here was solely whether GECC had transferred unauthorized *de facto* control. The evidence that it did—despite a 1975 Commission warning—is irrefutable. Finally, as to GECC's "fall-back" position that even if there was an unauthorized transfer of *de facto* control, it was not marked by any concealment or misrepresentation,[60] we note that although GECC continues to deny that Roberts, since 1976, has controlled KROQ, such *de facto* control clearly continues to this day.[61] At no point has GECC candidly notified the Commission that the only way KROQ could continue to operate after 1976 was to yield the reins over to Roberts and to allow him to attempt to "save the bacon" by removing the *de jure* majority principals from the "frying pan." We reaffirm the ALJ on this issue.

29. *Comparative.* GECC, yet again, urges that the Board take into consideration its "comparative showing." Indeed, in its pleadings, it attempts upon a requested reconsideration of the Board's

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[58] GECC Petition, at n. 19 (citation omitted).

[59] *Id.*, at n. 25.

[60] *Id.*, at pp. 22–23.

[61] Kenneth Roberts is less emphatic in his denial that a *de facto* transfer of control has occurred. While maintaining his legal defense, "Roberts does not request the Board to engage in a full-scale reconsideration of the factual record with respect to this [transfer of control] matter. There is not any factual dispute as to what occurred." Roberts Petition, at p. 14. Rather, Roberts:

> . . . does request, however, that the Board reconsider whether a valid distinction may be drawn between what Roberts did and what the stockholders did, assuming that an illegal transfer of control occurred. While we do not believe that the record evidence necessarily compels the conclusion that an illegal transfer took place, it is only fair to request the Board to recognize the different position of Roberts and the stockholders, assuming that they were engaged in a series of transactions that required prior Commission approval.

Id., at p. 15. The larger question of whether the conduct of Roberts, who converted his option into a 25% ownership interest in GECC in 1976 and who now owns 49%, is to be considered discretely from that of the licensee (GECC) is discussed more fully at paras. 33–36, *infra.*

Decision affirming the Initial Decision to submit a quasi-proffer of its alleged comparative assets.[62] However, the Commission itself has thoroughly considered the circumstances concerning GECC's failure to submit a comparative case and, after considering the ALJ's tolerance and solicitude, refused to grant GECC the very relief it here seeks. *George E. Cameron, Jr. Communications*, 84 FCC 2d 345 (1981). Where the Commission has considered and spoken on an issue, its subordinates may not alter its decision. *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720 (1966). Indeed, the Commission's extraordinary patience with GECC's erratic prosecution of its application was demonstrated long before GECC's recurring inability to timely proffer its "comparative case." Thus, as far back as 1976, the Commission expressed regret at having even gone so far as to designate a hearing in 1975 rather than cancelling outright the KROQ license. It stated:

> We believe [in 1975] that the cathartic effect of placing the renewal applications in hearing would spur the renewal applicants to resolve their problems and to undertake steps to resume service.
>
> 7. The record of succeeding events, as set forth below, has convinced us that we require more convincing evidence at this time that these licensees can and will prosecute the renewal applications and undertake realistic measures to resume broadcast service to the public at an early date. The record shows that the licensees did not file a timely appearance in the proceeding; that the presiding officer directed them to show cause why the applications should not be dismissed for failure to prosecute them; and that, when an appearance was filed (and accepted by the presiding officer), it was on behalf of fewer than half the principals, and did not include the persons who signed the renewal applications. The record also indicates that even now no affidavit has been filed which would evidence compliance with publication requirements. See paragraph 5, *supra*. Derelictions giving cause for dismissal of the applications cannot continually be excused, especially where, in the first instance, the failure to give notice had a direct bearing on the ability of competing applicants to file in timely fashion. The instant circumstances convince us that the underlying basis for designating a hearing in lieu of dismissing the applications as defective, was misplaced, and that the hearing, rather than expediting the reinstitution of service would only delay it further. *George E. Cameron Jr. Communications*, 58 FCC 2d 622, 624 (1976). It therein vacated its original designation order (*see* 56 FCC 2d 752 (1975)) and dismissed the GECC application, subject to one last 30-day grace period. 58 FCC 2d at 625. The matter of GECC's failure to submit an appropriate comparative case is, of course, part of a much larger panorama. Viewed in context, its inability below to submit a proper comparative case is consistent with its inability from the outset to conform with the rules governing ordinary licensees and applicants. It has been no better at prosecuting its application than at operating KROQ. Its arguments relating to its "comparative case" are firmly rejected.

30. *Miscellaneous*. GECC contends that the Board also erred in affirming the ALJ's refusal to add the transmitter site availability, reporting, misrepresentation, and ineptness issues against Royce that were previously requested by Baker-Smith and GECC. GECC's

[62] *See* GECC Supplement at pp. 14–20.

arguments with the ALJ's rulings, in the main, may be rejected without further consideration because they are doubly repetitive of arguments made at hearing and considered and fully addressed in our *Decision*, at paras. 48, 49, and 52. Reconsideration is, therefore, inappropriate. *See WWIZ, Inc., supra.*

31. We shall, nonetheless, address one contention raised by GECC in this regard. GECC faults the Board for failing to address cited precedent in denying Sections 1.65 and 73.3514 issues concerning Royce's failure to report an unsatisfied $5,465.13 judgment in its Burbank or Palm Springs applications.[63] *See Decision*, at para. 48. GECC had previously argued in its exceptions to the Initial Decision that the facts of this case closely paralleled those of *Cosmopolitan Enterprises, Inc.*, 49 FCC 2d 934 (Rev. Bd. 1974), where an existing Section 1.65 issues was expanded to consider the effect of an unreported outstanding judgment; it also cited, without discussion, a number of other cases.

32. *Cosmopolitan* and the other cases cited by GECC are inapposite. In *Cosmopolitan*, the applicant was remiss in not reporting information which, in light of an existing issue, raised the question of a pattern of conduct Conversely, Royce's omission of the $5,465.13 judgment was adequately explained, shown to have no decisionally significant impact upon its financial qualifications, and was not part of a pattern of nondisclosure. *See Decision* at para. 48. With respect to the other cases cited, these are also distinguishable because they involved matters of potential decisional impact. Thus, *Belo Broadcasting Corp.*, 49 FCC 2d 464 (Rev. Bd. 1974), dealt with a financial omission where the applicant's basic financial showing was deficient; *Martin Lake Broadcasting Co.*, 34 FCC 2d 956 (Rev. Bd. 1972), involved an applicant's failure to report major changes in its stock ownership; *Berwick Broadcasting Corp.*, 12 FCC 2d 175 (Rev. Bd. 1968), concerned much larger unreported outstanding judgments totalling $471,833.13; *Fidelity Radio, Inc.*, 1 FCC 2d 1145 (Rev. Bd. 1965) involved an unreported judgment resulting from misappropriation of corporate funds; and, in *Henderson Radio, Inc.*, 46 RR 2d 771 (ALJ 1979), a Section 1.65 issue was added because of unreported tax liens resulting from the applicant's failure to pay withholding taxes to the government. Having reviewed each of these cases, we reaffirm that the ALJ was correct in refusing to add the requested issues.

[63] As indicated in para. 14, *supra*, Section 1.65 of the Commission's Rules (47 CFR § 1.65) requires applicants to inform the Commission within thirty days wherever the information furnished within its application is no longer substantially accurate in all significant respects or whenever there has been a substantial change as to any other matter which may be of decisional significance. Section 73.3514 (formerly Section 1.514), 47 CFR § 73.3514, requires applicants to provide all of the information called for in the application form.

Kenneth J. Roberts

33. As noted earlier (*see, e.g.*, note 3, *supra*), Roberts does not generally appeal on the issues underlying the disqualification of GECC. Rather, Roberts requests the Board to reconsider its prior view that he is to be considered herein as a GECC principal. Roberts contends that because he did not become a GECC principal until 1976 when he exercised the option granted to him in 1973 to acquire 25% of GECC, the Board ought to permit GECC, *qua* GECC, to sell KROQ to Roberts (who now owns 49% of GECC with options to acquire nearly 100%) under the doctrine of *Second Thursday Corp.*, 25 FCC 2d 112 (1970) and progeny cases. Roberts further suggests that, inasmuch as many of the derelictions charged against KROQ occurred prior to 1976, the Board ought to specially find Roberts, *qua* Roberts, qualified to be a licensee. Roberts states:

> First, the [Board's] *Decision* may be read to represent an unwarranted and unintended finding that Kenneth J. Roberts, as an individual, is not qualified to be a licensee of the Commission in this proceeding or any other proceeding and that no distinction can be drawn between his qualifications and those of the GECC stockholders, whose involvement, as distinguished from Roberts, has been characterized by the Board as a 'lamentable chronicle of management ineptitude and of an all but wanton abandonment of the public trust'. *Decision*, paragraph 5.

Roberts Petition, at pp. 5–6 (footnote omitted). Roberts then postulates that, if *he* is found to be personally qualified, he should be given, at a minimum, the right to be individually compared with the competing applicant, Royce. *Id.*, at p. 11. We address these theories below.

34. First, and as explained in our prior examination, Roberts is not an "innocent creditor" of GECC within the purview of *Second Thursday, supra. Decision*, at para. 54. Although Roberts' relationship with KROQ commenced as that of a creditor in 1973, *I.D.*, paras. 15, 41, that relationship progressively began to change. By 1976, Roberts had purchased the outstanding debts of GECC (some at a discount) (*id.*, para. 33); he then sued the GECC principals on those debts as assignee (*id*); he settled the claims with the GECC principals in exchange for cash and, in some cases, the principals' interests in GECC (*id.*, at paras. 42–49); he exercised his option to acquire a 25% interest in GECC and has since acquired 24% additional *de jure* interest as well as further options to purchase almost 100% of GECC (*id.*, at Conclusions, para. 9); and, in 1979, Roberts formally took over as president and managing partner of GECC (*id.*, paras. 51–52, Conclusions, para. 9). Hence, the record reflects that Roberts, long ago, elected to become more than a "mere creditor" of GECC.[64] At

[64] GECC contests the Board's observation that Roberts desired, early on, to become the owner of KROQ; it urges that Roberts wished only to become a partial owner. GECC supplement, at n. 14; *see also* Roberts' testimony reproduced at *Decision*, n. 24; Tr. 1002.

any of a number of points along the temporal spectrum, Roberts could have elected to cease his operational involvement with GECC and to remain simply a creditor. It might have as early as 1973 when his investment was only $600,000 (*I.D.*, para. 41). However, in 1976, Roberts elected to legally convert his status from that of creditor to that of principal. *See generally*, *I.D.*, paras. 42–49. And, there is no dispute that since 1976—and *prior to* the Commission's 1977 redesignation of this hearing—Roberts has been the largest single principal of GECC.[65]

35. It is not stipulated as to why Roberts affirmatively elected to convert his legal status from one of creditor to that of principal. Although the other principals were apparently personally liable to Roberts on the loans from him, Roberts presumably preferred the security of an equity interest in the station. Or, perhaps, in acquiring other creditors' interests at a discount, Roberts believed he was effecting a reduced price acquisition of KROQ AM/FM. Whatever his reasons, Roberts voluntarily chose to convert the debt owed to him into equity (*see I.D.*, paras. 42–49) and he may not at this late date claim to be an "innocent creditor." Indeed, even if we had not affirmed the ALJ's finding that Roberts has been in *de facto* control of the station since 1976, Roberts' voluntary decision to convert to an equity owner prior even to the instant designation for hearing in 1977 would deprive him of the right to now claim "innocent creditor" status under *Second Thursday*.[66]

36. Second, we cannot accord with Roberts' request to single him out from the other GECC principals and to specially find that Roberts, individually, is qualified to be a licensee and to permit "GECC" to assign the station to Roberts. The most elementary reason why a discrete finding as to Roberts' personal qualifications

[65] Roberts' Petition (at p.4) notes that the Board was incorrect in holding that Roberts "has since 1973 been by far, the largest individual equity partner in the licensee." We will acknowledge that more precision was warranted. *Compare Decision*, at n. 15. However, in using our terminology, we meant to connote that even before his exercise of the initial option to acquire a 25% interest in GECC, Roberts was more than an ordinary debt holder with respect to the other principals. Thus, Roberts attended a partnership meeting as early as 1973 (*I.D.*, para. 19); he was elected and served briefly as president in 1974 (*id.*, para. 22); he has attended board of directors' meetings regularly since 1973 (Tr. 1070); and, in 1975, he entered into an agreement to purchase all of GECC, to indemnify all others, to furnish all funds for broadcast operations, and to manage the station pending FCC approval of an assignment of license to him (*id.*, para. 29). Moreover, in explaining why Roberts was galvanized into action after 1975, it is submitted: ". . . the [other GECC] stockholders wished to limit their financial exposure further from operation of the station. Roberts took on the risk of full exposure for the operation of the station." Roberts Petition, at p. 15. It is that "risk of full exposure" that Roberts now eschews.

[66] Moreover, neither *Second Thursday* nor its progeny involved situations where there was a competing applicant. From that standpoint alone, *Second Thursday* is inapposite.

to succeed to the license of KROQ would be inappropriate is that the Commission has designated no issue with respect thereto. As we have noted in a recent case which involved a curiously similar request for relief, *West Jersey Broadcasting Co.*, 90 FCC 2d 363, 371 (Rev. Bd. 1982), the issue before the Board is the qualification of the licensee, not the purported credentials of an individual principal thereof. Although Roberts, by his own choice, has appeared in this proceeding as a party-intervenor, he is decidedly not a separate party-applicant. Not only is Roberts an inseparable component of GECC at this point, he has no individual application before the Commission, having withdrawn his own mutually-exclusive application (d/b/a KRE Broadcasting, Inc.) in 1976. *See I.D.*, paras 31–32. Nonetheless, Roberts requests that he, individually, be given comparative consideration *vis-a-vis* GECC's competing applicant, Royce.[67] We have held earlier that, by virtue of the Commission's decision in *George E. Cameron Jr. Communications*, 84 FCC 2d 345 (1981), GECC itself had limited its opportunity for the conventional comparative analyses. *See* para. 29, *supra*. *A fortiori*, Kenneth Roberts—who formally withdrew a competing application in 1976 and who has proffered no individual comparative showing (and is not now permitted to do so)—is not entitled to discrete comparative consideration.

37. Third, GECC having been found unqualified to remain a licensee, the law does not permit a post-hearing alienation of the license. *Stereo Broadcasters, Inc.*, 74 FCC 2d 543 (1979), *aff'd Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1981); *West Jersey Broadcasting Co.*, 90 FCC 2d 363 (Rev. Bd. 1982). In *Stereo*, the Commission solidified its "minority distress sale" policy[68] and held squarely that it would not permit a post-hearing assignment of a defunct license, even to a minority group. Here, Roberts seeks the Board's allowance of a post-hearing sale not to a minority group, but to him.[69] As we indicated in *West Jersey* v. *Broadcasting*, *supra*:

> West Jersey admits, as it must, that it meets none of the foregoing criteria for an exception as set forth in the *Minority Ownership* policy statement. What it does not say, of course, is that the precedent set by a grant of the relief requested here by West Jersey would wholly eviscerate the carefully balanced incentives embodied in the minority ownership policy statement and undercut fatally the disincentives inherent in the Commission's general policy of refusing to permit disqualified licensees to avert the consequent processes of law. Were a disqualified licensee permitted to avoid the serious ramifications of non-renewal or revocation by simply passing the sullied license, hand-over-hand, throughout its organizational

[67] *See* Roberts Petition, at p. 11, where it is asserted: "At a minimum, Roberts should be given the opportunity to be heard and to compete for the license in a comparative hearing. . . . At a minimum, Roberts should be granted an opportunity to compete with Royce for the license."

[68] *See generally Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), *clarified*, 44 RR 2d 479 (1979).

[69] Roberts Petition, at p. 11.

structure until it reposed in the grasp of a putative 'Mr. Clean,' it is doubtful that the *Minority Ownership* 'distress sale' policy would retain much vitality.

90 FCC 2d at 372. Moreover, Roberts asks to correct any misimpression that he requests a ruling allowing an assignment to him in order that Roberts may, in turn, sell the station to another party, Jose Molina. Roberts asserts[70]:

With respect to the Board's finding that Roberts requested the renewal of GECC's license for KROQ merely to sell it to Mr. Jose Molina, that finding does not fairly represent the evidence in the record, is contrary to Roberts' actual intent, and should not have been relied upon as a basis for the dismissal of Roberts' request that his creditor position be given consideration in this proceeding.

38. It will be recalled from the Initial Decision (at paras. 37–39) that Jose Molina was given an (unauthorized) option to purchase KROQ for $2 million; Molina is currently the station manager, having paid what he thought was $12,000 down, converted the station to a Spanish language format, and taken over sales for the station on behalf of United Latins, Inc. *I.D.*, paras. 37–38. Molina claims to have invested about $200,000 in cash and equipment in the station (Tr. 1829) and he considers that stipend in the following manner:

Q. Do you consider the money that you have put into the station a loan?

A. I consider it an advance for future negotiations.

Q. Do you consider it a payment towards purchase of the station?

A. In a way I do. If it can not be purchased, then I am out of luck.

Q. Have you maintained records of your investments in the station?

A. Yes.

Q. Has Mr. Roberts or Mr. Castillo been kept informed of your investments in the station?

A. Every day, sir. I cry every day. Every day.

Q. Are these advances that you are making toward the ultimate purchase price of the $2 million, in your mind?

A. It is my understanding of previous discussions, and we are now currently working on that particular – if, I don't know, if it can be done or not—working very diligently right now, at this very moment.

Q. You are working diligently now at formalizing an agreement? Is that why you are saying?

A. Or trying to legally, with lawful money, buy the radio station.

Q. Have you been negotiating with Dr. Castillo about this?

A. Yes, sir.

Q. And Mr. Ken Roberts?

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[70] Roberts Petition, at p. 12.

A. Yes, sir . . . . [Tr. 1830–31.]

See also Testimony of Dr. Manuel de J. Castillo:

Q. And isn't it true that Mr. Molina, since August of '78, has put in over $200,000?

A. The answer is correct.

Q. Is there any commitment by George E. Cameron Communications to pay Mr. Molina back the money that Mr. Molina has put in?

A. The answer is no.

Q. Isn't it true that you told Jose Molina that if George E. Cameron Communications is successful in obtaining its license renewal that Mr. Molina will have an opportunity to buy the AM station?

A. That is true. [Tr. 1686-87]

See also Testimony of Kenneth J. Roberts, Tr. 1034–35. Notwithstanding, Roberts now asserts: "Whatever Molina's expectations, they do not square with the current intent of Roberts."[71]

39. Even if we accept Roberts' claim that he has no present intention to sell KROQ, we do not believe that Commission policy permits a post-hearing sale to him. Thus, even if, *arguendo*, we consider Roberts to be separate and distinct from GECC and, again *arguendo*, even if we were to ignore the fact that Roberts has assumed an unauthorized *de facto* control of KROQ or the fact that many of the station's other violations occurred *after* Roberts converted to an equity partner in 1976, a post-hearing sale to Roberts by "the licensee" would still be impermissible. GECC has been found unqualified for renewal and, as a matter of law, has nothing to sell. *Stereo Broadcasters*, *supra*; *West Jersey Broadcasting*, *supra*. And, perforce, no Commission case of which we are aware permits a post-hearing assignment in the face of a qualified competing application, even those cases involving genuinely "innocent creditors." For these reasons, Roberts' extraordinary request must be denied.

PETITIONS TO REOPEN RECORD

40. On November 5, 1982, GECC filed a petition seeking to reopen the record and enlarge the issues against Royce to include issues relating to Section 1.65, financial qualifications, and effectuation of integration proposals based upon Royce's alleged failure to report its filing of two applications for new television broadcast stations at Caldwell, Idaho, and Citrus Heights, California. GECC asserts that these are the third and fourth instances where Royce has failed to amend its Burbank application to report subsequently filed applications (two prior instances were considered in our *Decision*, at paras. 48–49) and argues that a Section 1.65 issue is warranted against Royce. GECC also argues that the filing of the

[71] Roberts Petition, at p. 13.

Caldwell application casts serious doubts on Royce's financial qualifications and justifies the addition of a financial issue. Specifically, GECC claims that Royce proposes to finance the Burbank station through a $500,000 loan from the Bank of America to be secured in like amount by the parents of Royce's sole stockholder, Edward R. Stolz, II. Analyzing the parents' balance sheet, and noting that two of Royce's other applications (Desert Hot Springs and Caldwell) are also relying upon bank funds secured in full by Stolz's parents, GECC contends that, at most, only $269,718 is available to Stolz's parents to secure the $500,000 Burbank loan. In addition, GECC contends that an issue is warranted as to Stolz's ability to effectuate his full-time integration proposal at the Burbank station since the Caldwell television application also contains a pledge by Stolz that he will be integrated part-time at the Caldwell station.

41. GECC further contends that since the proceeding must be remanded to explore the issues it raises above, the Board should also add a technical violations issue against Royce based on the issuance of four Official Notices of Violations against Station KWOD(FM), Sacramento, California, between February 1977 and April 1982. GECC notes that Stolz is the general manager and chief engineer of Station KWOD(FM). Even though it concedes that the test for reopening the record may not have been met in this regard because three of the Notices predate the closing of the record herein, GECC argues that since a technical violations issue was added against it based on Notices of Violations, a similar issue must be added against Royce. Finally, GECC requests an "ineptness" issue against Royce premised on the technical violations and reporting omissions alleged above, and other shortcomings previously alleged (and considered in our *Decision*, paras. 48–52).

42. The Board will not reopen the record and add the requested issues. It is well established that a petition to reopen the record must be supported by newly discovered evidence, that the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of hearing, and that the new evidence, if true, would affect the decision. *See The News-Sun Broadcasting Co.*, 27 FCC 2d 61, 62 (1971); *Julie P. Miner*, FCC 76R-47, 36 RR 2d 313 (Rev. Bd. 1976). Here, GECC's petition fails to meet the above test. Its allegations regarding the technical violations are, by its own acknowledgement, not newly discovered or diligently raised; and, while the filing of the television applications occurred post-hearing (respectively, February 16 and August 8, 1982), GECC's contentions based on those filings are insufficient to affect our ultimate disposition in this proceeding. We shall turn first to the requested issues concerning Section 1.65, financial qualifications, and effectuation of Royce's integration proposal—all based on Royce's alleged failure to report the two television applications.

43. Initially, with respect to the requested Section 1.65 issue, we

perceive no intent on the part of Royce to deceive the Commission or to conceal information relating to its television applications nor do we find "a pattern of flagrant disregard for our reporting requirements" of the type found with respect, for example, to GECC. *See para.* 11, *supra.* Nor has GECC demonstrated that the unreported information could be of decisional significance. *See Merrimack Valley Broadcasting, Inc.*, 52 RR 2d 1210, 1220 (Rev. Bd. 1982). Royce submitted the affidavit of Stolz in its opposition to the petition to reopen wherein he averred that he was unaware that the Burbank application had to be amended after it had been granted by the ALJ's Initial Decision (Royce Opposition, Exh. D). The unlikelihood of any intent to conceal on his part is demonstrated by the fact that the instant Burbank application was specifically referenced in both of the television applications. *See David Jordan*, 51 FCC 2d 940 (Rev. Bd. 1975). And, although GECC argues that Royce should have been on notice because of its previous reporting problems (*see Decision*, at paras. 48–49, where Royce's failure to report two other pending applications was considered) that subsequently filed applications had to be reported, there is nothing before us to contradict Stolz's attestation that he misunderstood his reporting obligation to end upon grant of Royce's application by the *I.D.* We do not here condone Royce's reporting failures; however, we find no evidence of deliberate concealment or of an aggravated pattern of nondisclosure such as would warrant further action. *See Washington Association for Television and Children (WATCH)* v. *FCC*, 665 F.2d 1264, 1970 (D.C. Cir. 1981); *Radio Station WABZ, Inc.*, *supra.* Royce's failures are to be contrasted with the situation at KROQ where the reporting failures were critical and recurring, even after the Commission's express warning. *See* para. 11, *supra.* And, for the reasons stated below, we find no decisional impact on Royce's financial qualification or integration plans resulting from the omissions in question.[72]

44. With regard to GECC's request to explore Royce's finances, we agree with the Mass Media Bureau that Royce's television application filings have no decisional impact on Royce's financial qualifications. In opposing reopening, Royce explained that although its original financial plan was based upon a showing of construction costs and anticipated *first year* operating expenses, subsequent Commission standards require an applicant merely to show that it could meet *three month* operating expenses and construction costs. As calculated by Royce, those latter costs come to $165,095.10. Thus, even assuming, as GECC calculates, that the collateral available to Stolz's parents to secure the Burbank loan would be reduced by their

[72] In addition to the reasons stated below, we point out that filing of the television applications would have no impact on the diversification criterion of the standard comparative issue. It is Commission policy not to take account of applicants' other pending applications. *See Hi-Point Broadcasting Co.*, 14 FCC 2d 365, 366 (Rev. Bd. 1968).

other collateral commitments to $269,718, this figure would appear to be more than sufficient to secure the considerably lesser amount needed to finance the subject station. In any case, however, and in order to provide further assurance of its financial qualifications, Royce has submitted an amended loan commitment letter from the Bank of America, Sacramento, California, which reduces the amount of the loan and matching collateral obligation of Stolz's parents to $250,000. Since this figure is more than sufficient to meet Royce's costs and there is no question that Stolz's parents can provide at least that much collateral, we are satisfied that no financial issue is required.[73]

45. With respect to GECC's challenge to Royce's integration proposal (*i.e.*, Stolz's promise to devote full time to the Burbank facility as general manager and chief engineer—*see Decision*, at para. 44—and his proposal to work part-time at the Caldwell station), Royce points out that the Caldwell television application identifies a Mr. Stelljes as the full-time, on-site general manager and specifies that Stolz will be "on-site only on weekends, holidays and on an as-required basis." Royce Opposition, pp. 21–22 (*citing* Caldwell application). Thus, Stolz's commitment to Caldwell is minimal on its face and does not negate his full-time proposal at the Burbank station. While GECC also refers to Royce's managerial role at his Desert Hot Springs proposal, this obligation was fully considered in our *Decision* (at para. 49) and not found to impact on the Burbank proposal. The Caldwell proposal does not appear by its terms to contradict the Burbank proposal. In addition, Royce submits an affidavit from Stolz affirming his proposal to serve as the full-time general manager of the Burbank station and pledging again to subordinate his other commitments to his Burbank proposal (Royce Opposition, Exh. L). Based on this representation, there is no record basis for discrediting Stolz's proposal to accommodate his lesser obligations to the other stations applied for as well. *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), relied on by GECC, is inapposite. In *Berryville*, the Board found no reasonable likelihood

[73] The new financial commitment was provided in a petition for leave to amend, filed by Royce on December 2, 1982. GECC opposes the financial portion of the amendment on the ground that the amendment was necessitated by a voluntary act on the part of Royce. We will grant the petition for leave to amend and accept Royce's amendment. Good cause exists for acceptance of the amendment. A showing of involuntariness is not required where, as here, the amendment tends to remove a disqualifying defect and confers no comparative advantage. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488–89 (1981). Royce acted diligently in obtaining the new commitment once potential disqualifying questions had been raised, the proposed amendment would not cause undue disruption of the Commission's processes, and no party would be unfairly prejudiced by the amendment. *See Gross Broadcasting Co.*, 46 RR 2d 1091, 1097–98 (1979), *Azalea Corp.*, 31 FCC 2d 561, 563, 22 RR 2d 909, 911–12 (1971). The other information contained in the amendment will be accepted for the limited purpose of keeping Royce's application up to date.

that the principal involved would effectuate his integration proposal because of the unusually high number of hours in the proposed work week, the division of responsibility among several stations in different communities, heavy drive time, and improbable relocation plans. Here, by contrast, Stolz has consistently represented that his primary commitment is to the Burbank facility and that his other obligations will be handled by telephone or periodic visit when needed. *See Decision*, at para. 49. Therefore, Royce's failure to report the filing of the television applications provides no basis for enlargement of issues relating to reporting (§ 1.65), financial qualifications, or effectuation of Royce's integration proposal.

46. Nor do we find any grounds for the addition of a technical violations issue based on infractions at KWOD(FM). As noted previously (*see* para. 42, *supra*), GECC does not allege that the technical violations, by themselves, justify reopening the record (GECC Petition to Reopen at n. 4) and we agree with this assessment. The KWOD violations, in most part, occurred more than a year before the record was closed. Additionally, on their face, the Notices do not appear to reflect any repeated violations. Royce asserts that the infractions were not, in fact, repeated, and further states that the licensee quickly corrected the violations after they were brought to its attention. See Royce Opposition, at p. 19. GECC's argument that a technical violations issue must be specified against Royce because a similar issue had been added against it is without merit. By comparison, the infractions alleged and subsequently proved against GECC involved a great number of serious and continuing technical violations occurring over a period of several years. *See Decision* at paras. 22–27. GECC's technical shortcomings stand in sharp contrast to the infractions involving KWOD(FM). *Compare Memorandum Opinion and Order*, FCC 79M-1303, released November 5, 1979 (adding technical violations issues against GECC). Finally, GECC's allegations do not warrant an ineptness issue. An ineptness issue will be added only where an applicant's conduct has concerned relevant matters of major significance and where the conduct has disclosed a pattern of carelessness and inadvertence. *Edward G. Atsinger, III, supra*. We agree with the Bureau that the alleged shortcomings considered here (and previously in our *Decision*) do not disclose a serious pattern and have not been shown to be of major significance. In our view, it would be inappropriate to specify an ineptness issue based merely on an accumulation of allegations where no single allegation or combination of allegations is sufficient to support addition of an issue. Again, a comparison with the matters which led the Commission to designate an ineptitude issue against GECC is instructive. *See Decision*, at paras. 5–18. p1 47. On December 17, 1982, GECC filed a further petition to reopen record and to enlarge issues to include financial, Section 1.65, and misrepresentation issues against Royce based on material contained

in an application amendment filed by Royce on December 2, 1982. (*See* note 73, *supra.*) That material was also attached to Royce's opposition to the November 1982 petition to reopen and to enlarge issues and includes the new commitment letter from the Bank of America, the letter from Stolz's parents agreeing to provide collateral for the loan, the balance sheet of Stolz's parents, revised cost estimates using the three month standard, and a list of other broadcast applications filed by Royce. *See* para. 44, *supra.* With respect to its request for a financial qualifications issue, GECC renews its claim that Royce is financially unqualified because Stolz's parents have insufficient collateral to support the loan guarantees they have pledged for three of Royce's proposed stations. We disagree. The Bank of America loan commitments are for $250,000 and $200,000 for the Burbank and Caldwell applications, respectively, and the Desert Hot Springs application is to be financed by a loan of $100,000 from the Crocker National Bank, Sacramento, California, secured by a Certificate of Deposit in like amount to be provided by Stolz's parents. Thus, the total collateral requirements for the three stations is $550,000. The Bank of America requires security for its loans to be in the form of stock certificates valued at 75% of present market value and savings accounts. Stolz's parents' balance sheet of November 22, 1982, shows $380,000 available in stocks and bonds, $204,000 in cash deposits in the Bank of America, and $116,000 in cash deposits in other banks. Thus, counting only 75% of the value of the stocks and bonds ($285,000), the $204,000 cash on deposit with the Bank of America, and the $116,000 on deposit elsewhere, Stolz's parents still have sufficient funds ($605,000) to provide collateral to support the loan guarantees for all three stations. The fact that they have agreed to provide collateral of up to $500,000 for the Burbank loan from the Bank of America is not significant since the bank is now requiring only $250,000.[74] GECC's unsupported contention that it is unrealistic to believe that Stolz's parents will tie up most of their liquid assets for their son's stations provides no basis for a financial issue; it is based on sheer conjecture. *See* Section 1.229(d) of the Commission's Rules. Finally, a financial qualifications issue will not be specified on the grounds that Royce's costs estimates are outdated, as argued by GECC. GECC's contention is largely speculative because it has not supplied an affidavit of a person with personal knowledge of to what extent the costs may have increased and as to how much the costs should be at present

[74] GECC also suggests that Royce's Citrus Heights proposal is likely to be financed in the same manner as its other applications and thus adds support to its argument for an issue. We disagree. Royce has certified its financial qualifications for Citrus Heights pursuant to current Commission practice and that is all it is required to do. GECC's speculative contentions on how Royce will finance this proposal do not meet the requirements of Section 1.229(d) for enlargement of the issues.

(*see* Section 1.229(d)). Nor do Royce's cost estimates appear to be unreasonable on their face. *See Electrocum, Inc.*, 53 FCC 2d 201, 204–05 (Rev. Bd. 1975). In any event, Royce's estimate of construction and operating expenses is $165,095.10, and since it has a $250,000 loan available to meet its costs, this leaves a financial cushion of almost $85,000 to cover any increased expenses.

48. GECC again contends that a Section 1.65 issue is warranted because Royce has admitted, by implication in filing its amendment, that the filing of the other broadcast applications was required to be reported under Section 1.65. It further contends that the reduction in the bank commitment from $500,000 to $250,000 for the Burbank application may show a deterioration in Stolz's financial situation that should have been reported under Section 1.65. Finally, GECC contends that a misrepresentation issue is warranted against Royce because Royce had a motive to conceal the information in the amendment and only filed it after being compelled to do so by GECC's petition to enlarge issues. GECC's allegations do not warrant addition of either issue. Royce has never contended that it made no error in failing to report the filing of its other broadcast applications. However, it explained to our satisfaction why the omissions occurred. (*see* para. 43, *supra*.) Moreover, we agree with Royce that the fact that it has now amended its Burbank application shows merely that is attempting to correct its earlier oversights once those oversights were brought to its attention. Moreover, no issue will be specified merely on GECC's speculative contention that Royce's financial situation may have deteriorated which Royce should have reported; in fact, Royce demonstrated the availability of more than enough funds to meet its costs. And, finally, GECC offered no articulated rationale why a misrepresentation issue should be added. Contrary to its allegations, Royce's amendment contained no information adverse to its qualifications and thus no motive to conceal is apparent. GECC has utterly failed to meet the test necessary for the addition of a misrepresentation issue. *See, e.g., Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982).

CONCLUSIONS

49. In its prefatory arguments, GECC invites the Board to contemplate the larger policy implications of its *Decision* and states[75]:

> The decision in this case, if permitted to stand, sends the wrong signal to the broadcasting industry and those who are considering risking capital to enter it at a time when the Commission is actively seeking to disentangle itself from the excesses of regulation and to rely more on marketplace forces. This decision says, in effect, that if you risk your capital to enter the broadcast business and you run

[75] GECC Petition, at p. 2.

into financial difficulties that in turn create temporary problems of compliance with FCC rules and policies, you stand to lose everything.

The contrapositive: were we to grant GECC's ultimate prayer, it would "signal" that a licensee could (1) accept a Commission license without troubling to become cursorily acquainted with fundamental FCC rules; (2) delegate its bedrock responsibilities to an inexpert promoter; (3) apply for an additional station at a time when it is incapable of supporting its initial station; (4) violate all manner of important FCC rules; (5) transfer control of its stations despite a pointed Commission admonition; and (6) fail to file a timely "comparative case" in the face of competing applications—and nonetheless be renewed over the opposition of a qualified competing applicant. Signals aside, that is not the law. *See generally Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (1982); *Simon Geller*, 90 FCC 2d 250 (1982), *appeals docketed sub nom. Committee for Community Access, et al.*, Nos. 82–2314, 2373, 2400 (D.C. Cir.).

50. It is true that the GECC principals have been thoroughly open and candid in this proceeding; indeed, they have been startlingly candid with respect to their shortcomings as a collective licensee. As the torturous record here attests, the KROQ experience has been a nightmare—for regulatee and regulator alike. The licensee principals were not maleficent, merely hapless; it is unarguable that they were "in over their heads," financially and organizationally. In a not-too-distant renewal case, *West Coast Media, Inc.* v. *FCC*, *supra*, the Commission observed that the ALJ—who had granted a 1-year renewal—had found:

> '. . . that the West Coast principals are honorable men who have erred because of ignorance and misjudgments. Experience has dispelled their ignorance, and misjudgments are less likely to occur.' 79 FCC 2d at 622. The Commission nonetheless reversed the ALJ, denied the renewal, and held:
>
> In our view, there is simply no justification to give inexperienced broadcasters the advantage of performing below minimal renewal standards for a license term without suffering the same consequences which experienced broadcasters would incur. . . . '[i]nsubstantial past performance should preclude renewal of a license. The licensee, having been given a chance and having failed, should be through.'

Id. (footnote and citation omitted).[76] We recognize that non-renewal will have serious ramifications for the original principals of GECC even though they appear to have been largely indemnified by Kenneth Roberts with respect to their earlier liabilities. Still, we must apply the law dispassionately and, in that connection, find as

[76] In *West Coast Media*, the Commission stated that "[i]t is expected that principals entering the broadcast field for the first time will hire experienced managers until they have gained experience" (*see id.*). Even here, however, GECC failed in that it reposed its public interest responsibilities entirely in Gary Bookasta (*see I.D.*, paras. 9–20, Conclusion, para. 3), a non-principal who had no prior experience in managing broadcast stations. Tr. 2956–58.

well that KROQ's specialized format (Spanish language) is not a fulcrum for renewal.[77] *See, e.g., Cosmopolitan Broadcasting Corp.*, 75 FCC 2d 423 (1980), *aff'd per curiam sub nom. Cosmopolitan Broadcasting Corp.* v. *FCC*, No. 80–1902 (D.C. Cir., filed June 29, 1981), *cert. denied*, 454 U.S. 1143; *Simon Geller, supra.*

51. Communications law apart, it is not easy to be censorious of the conduct of Kenneth Roberts. Finding himself deeply invested in GECC at a time when the original principals were unwilling or unable to support KROQ, Roberts stepped in with enough financial support, at least, to permit the station to recommence operations in 1976 after a 2-year lacuna. Thereafter, and unable to rely on the controlling principals to maintain operations or to protect his multi-million dollar investment, Roberts converted loans and options into GECC equity and supplied sufficient funds after 1976 to permit the restoration of broadcasting operations. Nevertheless, even after Roberts took the lead in 1976, many violations of FCC rules continued. Thus, for example, while Roberts did expend funds after 1976, KROQ's engineer Darryl Wampler complained in December 1977, that KROQ's technical operation was still far below legal specifications. *See Decision*, at para. 27 (*reprinting* Bur. Exh. 238). No doubt, GECC was disinclined to commit more generously after 1977 in view of the fact that KROQ's license appeared in serious jeopardy by virtue of the Commission's designation of the license for hearing on many disqualifying issues. This hazard was accompanied by the presence of competing applications. A licensee's disincentive to invest in such circumstances is clearly a negative by-product of the comparative renewal process, especially since "upgraded" performance receives little, if any, weight. *See* para. 7 *supra*. On the other hand, Roberts was aware of his risk when he converted to an equity owner of GECC and he also must stand or fall on KROQ's record. We cannot accede to Roberts' requests to change his present legal status (1) from *de jure* GECC principal back to "innocent creditor"; or (2) from a party who withdrew his individual competing application in 1976 (*I.D.*, para. 32) to a separate applicant now entitled to "personal" comparative consideration *vis-a-vis* Royce (and/or GECC). Finally, there is no precedent which would permit the post-hearing sale of KROQ's license to Roberts in the wake of the disqualification. *See* paras. 33–39, *supra.*

52. As to Royce, we have recognized both in our *Decision* and hereinabove that its application is not perfect and that several rule violations have attended its record. However, in light of the fact that Royce's application has been on file since 1975 (*see* 56 FCC 2d 752), occasional ministerial reporting lapses—while not condoned—are

[77] GECC urges renewal, in part, on the basis of its Spanish language format. *See, e.g.*, GECC Petition, at pp. 1–2; GECC Supplement, at pp. 19–20. However, GECC does not allege, nor could it (*see Broadcasting Yearbook 1982*, at p.C-25), that KROQ is the sole Spanish language station in its service area.

not entirely unexpected. Nor are changes in financial plans. But, Royce's limited derelictions would warrant, at most, a comparative demerit of non-decisional magnitude. *Cf. WADECO* v. *FCC, supra.* More troubling are Stolz's ambitious personal integration plans with respect to newly-applied-for television stations. Although none of Stolz's later integration pledges is so strong as to contradict his full-time (40 hour per week) proposal for the instant AM station, Stolz has maneuvered as close to the perimeter as should be permitted without further testing his *bona fides* on this matter. However, to date, Royce has demonstrated no conduct or condition warranting absolute disqualification or remand.

53. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Royce International Broadcasting Company on December 2, 1982, and by George E. Cameron, Jr. Communications, Inc. on September 30, 1982, ARE GRANTED, and the amendments ARE ACCEPTED; and

54. IT IS FURTHER ORDERED, That the petition and further petition to reopen the record and to enlarge issues filed November 5 and December 17, 1982 by George E. Cameron, Jr. Communications, Inc. ARE DENIED; and

55. IT IS FURTHER ORDERED, That the motion for leave to file a supplement to petition for reconsideration filed November 10, 1982, by George E. Cameron, Jr. Communications, Inc. IS GRANTED, and the supplement IS ACCEPTED: that the motion to accept late-filed opposition filed November 9, 1982, by Royce International Broadcasting Company IS GRANTED; and that the petition for reconsideration filed October 25, 1982, as supplemented November 10, 1982, and the request for oral argument filed November 10, 1982 by George E. Cameron, Jr. Communications, Inc. ARE DENIED; and the petition for reconsideration filed October 25, 1982, by Kenneth J. Roberts IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL *Member, Review Board*

Application, Processing of
Domestic Fixed Satellite
Reconsideration, Petition for, Denial of
Satellite Domestic Communications

Petition for Reconsideration of Commission's 1982 Order establishing processing group for domestic fixed satellite applications denied. Petitioner failed to substantiate claim of mutual exclusivity, and Commission procedure determined to be more effective and efficient than alternative advanced by petitioner. *–GTE Satellite Corp.*

FCC 83–183

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Processing of pending space station applications in the domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: June 20, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. Before the Commission is GTE Satellite Corporation's (GSAT's) petition for partial reconsideration of *Domestic Fixed Satellite Service*, 90 FCC 2d 1 (1982) (hereinafter *Order*). In its petition, GSAT argues that our *Order* is unlawful insofar as it bars domestic satellite applications filed after May 18, 1982 from consideration with earlier filed applications with which they may be mutually exclusive. Advanced Business Communications, Inc. (ABCI), American Satellite Company (ASC), Rainbow Satellite, Inc. (RSI), RCA American Communications, Inc. (RCA Americom), Satellite Business Systems (SBS) and United States Satellite Systems, Inc. (USSSI) filed oppositions to GSAT's petition. Because the alleged condition of mutual exclusivity does not exist, and because our processing procedure is preferable to that proposed by GSAT, we deny reconsideration.

I. *BACKGROUND*

2. In the *Order* we adopted a procedure to process as a group the then-pending domestic satellite space station applications. Applications filed subsequent to the adoption of the *Order* are to be

processed after those then on file. The applications were "frozen" in order to define the group for processing purposes. This procedure allows us to act upon the applications in a timely manner and to assign orbital locations efficiently. We noted that in assigning orbital locations, we must consider the specific proposals of the applicants to minimize potential interference and to maximize the number of satellites to be accommodated. Thus, the *Order* was made effective immediately upon adoption because we feared that speculative filings otherwise would be encouraged, thus delaying action on any of the then pending applications. However, in defining this group we did not preclude favorable action on subsequently filed applications. Thus, we emphasized that our group approach did not prevent the subsequent filing, or granting, of new applications for the 4/6 GHz bands, the 12/14 GHz bands or the 18/30 GHz bands.

II. *PLEADINGS*

3. GSAT asserts that the usable portions of the orbital arc in the 4/6 and 12/14 GHz bands are fast reaching the saturation point. Thus, according to GSAT, the grant of one application may preclude the grant of another and there exists a very real possibility of mutual exclusivity in applications for orbital assignments. Therefore, the Commission's processing *Order* is an unlawful cut-off and must be modified. GSAT asserts that the *Order* is unlawful because we did not give advance notice to potential applicants prior to its adoption. Additionally, GSAT claims that the *Order* "sub silentio" repealed the Commission's general procedural rule—Section 1.227(b)—which assures comparative consideration to prospective domestic satellite applicants in mutually exclusive situations. According to GSAT, insofar as the Commission's *Order* bars domestic satellite applications filed after May 18, 1982 from comparative consideration with earlier-filed applications with which they might be mutually exclusive, the *Order* is in conflict with the court's ruling in *Kessler*[1] in that it denies applicants their substantive rights that flow from *Ashbacker*.[2] GSAT also believes that the Commission's

[1] Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963). In *Kessler* the Commission imposed a "freeze" on the acceptance of applications for most standard radio broadcast stations without providing advance notice. The action was taken so the Commission could reexamine the standards used in assigning new or changed standard broadcasting facilities. In affirming the Commission's decision, the *Kessler* court stated, *inter alia*, that pre-freeze applications may not be processed and granted without also considering timely-filed post-freeze applications with which they are mutually exclusive.

[2] Ashbacker v. FCC, 326 U.S. 327 (1945). In *Ashbacker* two applications had been filed, one for a new broadcast station and one for a change in frequency. For reasons of electrical interference both could not be granted. The Commission granted one application and set the other for hearing. The court reversed, finding "if the grant of one application effectively precludes the other, the statutory [47 U.S.C. § 309] right to a hearing which Congress has accorded before denial of their applications becomes an empty thing." 326 U.S. at 330.

1980 Processing Order, 77 FCC 2d 946 (1980), which similarly identified a group of applications for simultaneous processing, is distinguishable. In that case there was no possibility of mutual exclusivity between applications. Today, GSAT argues, this is no longer true.

4. In particular, GSAT claims that the usable orbital arc at 12/14 GHz for its dual-polarized satellite system and 50-state coverage is effectively limited to the arc from 98° to 106° West Longitude. According to GSAT, orbital locations outside of this limited arc are inadequate for its purposes. In light of current authorizations and pending applications, GSAT continues, the assumptions of 1980 as they relate to mutual exclusivity are no longer valid. Therefore, GSAT argues, the Commission must modify its procedures in order not to preclude comparative consideration of later-filed applications that may be mutually exclusive with the applications that have been grouped for processing.

5. GSAT contends that the Commission may legally accomplish its fundamental objectives of allocating the usable orbital arc in the most efficient manner possible only through a modification of the processing procedure contained in our *Order*. Specifically, it suggests that the Commission defer action on all pending applications until the orbital spacing policies are resolved in CC Docket No. 81-704.[3] The Commission should then allow a discrete period in which existing applicants may amend their applications and new applicants may file applications in light of new rules and policies adopted in CC Docket No. 81-704. Only then, GSAT states, should the Commission process and grant the pending applications.

6. Six parties filed oppositions to GSAT's proposal. Although all opponents address the merits of GSAT's arguments, USSSI and RSI also assert that GSAT lacks standing to petition for reconsideration. The opponents all agree that there is, at present, no potential mutual exclusivity among the 12/14 GHz satellite applicants.[4] They identify the major problem with GSAT's petition as its failure to demonstrate that GSAT is in a mutually exclusive posture vis-a-vis those who had applications on file prior to the adoption of our *Order*.

7. Specifically, ASC observes that to create a mutually exclusive

[3] Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981). This proceeding is resolved in a companion order adopted today.

[4] USSSI, while it rejects GSAT's claim to mutual exclusivity on the grounds that GSAT's applications were untimely filed, does believe that mutual exclusivity can arise between applications on file before the processing *Order* was adopted. USSSI believes that "Ashbacker rights arise when a timely filed and fully qualified domsat applicant is granted facilities substantially different from or inferior to those requested, and another applicant is given the authorization sought by the first or one which is mutually exclusive with it." USSSI's Opposition, fn. 1. Because it is unnecessary to the resolution of GSAT's petition, we need not and do not address USSSI's argument.

situation GSAT relies on the assertion that its GSTAR satellites must be located within a small 8° segment of the orbital arc. Based upon its own self-defined concept of mutual exclusivity, GSAT alleges its application must be considered with the group selected by our *Order* for processing. ASC believes that GSAT should not be allowed to capitalize on the technological limitations of satellites it designed to the detriment of other satellite applicants. ABCI agrees that 50-state coverage and dual polarized satellites are factors that make 98° to 106° West Longitude the most desirable portion of the orbital arc. However, ABCI points out that, even taking into account these factors, an extended arc is in fact usable.[5]

8. ABCI also observes that nothing prevents the subsequent filing of an application that may seek one or more orbital positions previously assigned to another entity. Nor, ABCI believes, does anything prevent the Commission from later adjusting assignments so as to achieve a more efficient and equitable scheme.[6] The Commission could, ABCI believes, assign positions to the current group and still retain flexibility to make subsequent assignments. For example, it could reserve certain locations based on consideration of various criteria such as 50-state coverage.

9. ABCI, ASC, RCA Americom, RSI and SBS all state that the Commission's reserved right to assign orbital positions at variance with what an applicant requests, and to require operators to move their satellites after they are in orbit, prevents mutual exclusivity so long as new applicants can be accommodated in the orbital arc. Both RSI and RCA Americom state their belief that there still will be locations available, even if all pending applications in the current processing group are granted. Thus, according to RSI and RCA Americom, GSAT's application is not mutually exclusive with any other.

10. All opponents believe that the Commission's decision is sound. Because each satellite application may impact the entire satellite service, they argue, a group processing approach is the most expedient method of assigning orbital locations. Several also agree that discouraging speculative filings is a legitimate reason for not giving notice of the procedure before its adoption.

11. All of GSAT's opponents object to any modification of the processing order. They claim it would only result in additional delays and invite speculative filings. These delays, RCA Americom asserts, would culminate in the inefficiencies of comparative hearings. Such

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[5] ABCI notes that it too proposes a satellite system with 50-state coverage and dual polarized satellites. However, it acknowledges that the orbital locations it requests between 85° and 125° West Longitude will provide acceptable service at 12/14 GHz.

[6] This, ABCI remarks, is especially true since the launch of many of the satellites authorized in this present group will not take place for three or four years.

delays, SBS comments, would injure both the pending applicants and the public interest in the timely implementation of facilities and service by qualified carriers. ABCI concludes that the result of GSAT's proposal would be a nightmarish situation where the Commission's processes would be overwhelmed and the public denied additional service for a considerable period of time.

III. *DISCUSSION*

12. We are not persuaded to grant GSAT's petition for reconsideration.[7] First, GSAT has not established that the *Order* impermissibly compromises any of its legal rights. In particular, GSAT has failed to demonstrate mutual exclusivity between its applications and those in our current processing group. Accordingly, because such mutual exclusivity does not exist, GSAT's arguments that our *Order* violates the principles of *Ashbacker* and *Kessler* are without merit. Second, we believe that the issuance of our *Order* without notice was reasonable and required by valid Commission objectives. Finally, in balancing the interests of the various parties, as well as the right of the public to receive prompt and efficient service, we believe the processing approach defined by the *Order* is superior to that proposed by GSAT.

13. GSAT claims that our *Order* is unlawful in that it denies mutually exclusive applicants substantive rights that flow from *Ashbacker*. In *Ashbacker*, the court held that when two bona fide applications are mutually exclusive the Commission shall not grant one without affording a hearing to both. To do otherwise deprives the loser of the opportunity for a hearing provided by Section 309 of the Communications Act. A mutually exclusive situation arises when the grant of one application for all practical purposes precludes the grant of another. Thus, to invoke *Ashbacker* or *Kessler* GSAT would have to demonstrate that its applications are mutually exclusive with those we have granted today. It has failed to do so. None of the applications granted today precludes favorable action on GSAT's applications.

14. Contrary to GSAT's speculative claims, all usable orbital locations have not been assigned by today's *Orbit Assignment Order*.[8] GSAT asserts that even with a 2° orbital spacing standard, the entire usable arc—from 70° to 135° West Longitude—would be consumed if all pending and possible applications are granted. Notwithstanding GSAT's assertions, we consider the usable orbital arc in the 12/14 GHz band to be between about 60° and 132° West Longitude and thus larger than that assumed by GSAT. Moreover,

[7] Two opponents argue that GSAT lacks standing to petition for reconsideration. However, we believe it has demonstrated sufficient interest to address the merits of its argument.

[8] Memorandum Opinion and Order, FCC 83–186, adopted today.

on-ground spares are not, as GSAT believes, an express exception to our processing *Order*.[9] Hence, after today's assignments, and with the adoption of reduced spacing criteria in CC Docket No. 81–704[10], there are still orbital locations available in the usable portion of the geostationary satellite arc. Several of the additional locations available both for new entrants and for the expansion of existing systems, such as GSAT's, are specifically identified in today's *Orbit Assignment Order*, *supra*.

15. GSAT also argues that, because it seeks orbital assignments between 98° and 106° West Longitude, the grant of any application within that orbital arc would render its application mutually exclusive by definition. According to GSAT, its satellite system is effectively limited to this portion of the orbital arc. However, GSAT's claim is based on broad generalizations rather than on concrete engineering analyses. No affidavits were submitted by GSAT to provide specific facts in support of its claims.

16. Consequently, GSAT had not established its claim of mutual exclusivity. In the first place, we note that at least one orbital location is available for assignment in the portion of the orbital arc within which GSAT claims it must be located. But more importantly, in making such a claim, GSAT ignores our satellite processing procedures. These policies have successfully expedited the development of this dynamic industry, and continue to accomodate an increasing number of satellites in orbit.

17. The Commission has allocated spectrum differently in different services given the particular aspects of the services. For example, in many terrestrial services it is common for only specific channels to be available for assignment to licensees in specific areas of the country. In such instances two or more applicants requesting the same frequency allotment cannot be accommodated. In contrast, use of the radio spectrum in the domestic fixed satellite industry is assigned in a different and more flexible manner than in many terrestrial services. From the beginning of the service, the Commission has recognized the high risk, large capital investment requirements and long lead times characteristic of the domestic satellite industry. We believe that the technology must be developed by those who take the risks, of both success and failure, in the marketplace. Thus, rather than inflexibly prescribing the technical parameters of

[9] GSAT claims that its third application, requesting authority to launch its on-ground spare, falls within the paragraph 9 exception of our *Order* and should thus be processed along with the applications on file prior to its adoption. We disagree. The exception articulated in Paragraph 9 was intended to allow for the filing of launch applications for satellites whose construction was previously authorized for in-orbit use or as emergency replacements of failed satellites. *See* Domestic Fixed Satellite Service, 77 FCC 2d 956 (1980), for an elaboration of the conditions under which this exception could be claimed.

[10] Report and Order, FCC 83–184, adopted today.

orbital and frequency assignments, the Commission relies initially on applicants to design their own proposals for the Commission's consideration.[11] The Commission has also recognized the inherent flexibility of this technology to respond to changing circumstances and growing user needs. This includes the capability of satellites to provide adequate service over a significant range of orbital locations. For such fixed satellites, the entire allocated frequency band is assigned at the outset to insure sufficient capacity to make it economically viable over its lifetime.[12] However, orbital locations, which consider the applicant's needs along with those of other operators, are assigned to individual domestic satellites by Commission order. These assignments are temporary in nature, in that we have reserved the right to change them or adjust spacings between satellites if changing conditions so require.[13]

18. The Commission's flexible licensing policies and procedures have avoided institutional restraints and inhibitions to the development of the technology. Thus, the acquisition of experience with the technology has not been delayed. Additionally, this flexibility has allowed us to adjust our policies as experience dictates. The public benefits which have flowed from this rapidly growing industry have resulted from our ability to accommodate all of the previously filed applications with a minimum of regulatory interference, delay, or uncertainty. This flexibility is important to accommodate new entrants, the changing requirements of existing carriers, and satellites proposed by other countries. Thus, an applicant's request for a particular orbital location can not be dispositive of the location actually assigned by the Commission.

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[11] Domestic Communications Satellite Facilities, 22 FCC 2d 86, 93 (1970).

[12] This is not necessarily the case for other satellite services, such as Direct Broadcast Satellites, where different technologies, international regulations and economic considerations may make it necessary or feasible to assign only a portion of the allocated spectrum, or specific channels, to an individual licensee.

[13] All satellite launch authorizations make the orbital assignment subject to change on 30 days notice. *See, e.g.*, Orbit Deployment Plan, 84 FCC 2d 584 (1981). There have been a number of satellite relocations after initial positioning in orbit. These relocations were performed for a variety of reasons. For example, Westar II was relocated from its initial 90° West Longitude location to 123.5° West Longitude to provide service to Alaska. *See* Western Union Telegraph Company, 54 FCC 2d 976 (1975). Later, the RCA Satcom I satellite was moved from its initial location when Satcom II was launched to provide improved service to Alaska. *See* RCA Global Communications, 58 FCC 2d 656, 659 (1976). Both Westar I and Westar II were relocated at 79° West Longitude after their replacement by Westar IV and V at 99° and 123° West Longitude, respectively. *See* Western Union Telegraph Company, FCC 83–196, adopted today. *See also* COMSAT General Corporation, 84 FCC 2d 547, 558 (1981) (relocation of COMSTAR D-1). Finally, domestic satellites have been relocated to accommodate new systems, Satellite Business Systems, 86 FCC 2d 180 (1981) (to accommodate GSAT's initial satellite), and to adjust orbital spacings, Orbit Deployment Plan, *supra* at 614–615 (relocation of COMSTAR D-4).

19. We have also concluded that conflicting requests by different applicants do not give rise to comparative hearing rights.[14] The desire of an individual applicant for a particular location is, and must be, balanced against the requirements of other users (domestic and foreign) if the most efficient and practical use is to be made of the spectrum and the amount of service maximized. Assigning orbital locations is a complex process involving many factors, parties and even, at times, foreign countries. Although private interests may be considered, when they are balanced against strong public considerations, the latter must prevail. In addition, there are no significant differences between nearby locations in the same portion of the geostationary arc.[15] Thus, the objective of our policies and procedures has been to accommodate as many applicants as is efficiently possible with a minimum of administrative costs or delays. In particular, artificial or inflexible definitions of mutual exclusivity have been avoided and an increasing number of satellites have been authorized to satisfy growing demand. We have thus avoided traditional administrative procedures, such as comparative hearings, that have been used in other services that we regulate. The

[14] Western Union Telegraph Company, 46 FCC 2d 162, 165 (1974). Although a hearing cannot be invoked with respect to the actual orbital location assigned to any particular satellite, such hearing rights might be invoked in the event all applications of fully qualified applicants within a processing group cannot be granted. However, even in such a situation, the Commission has wide discretion to fashion procedures to insure that administrative proceedings do not delay service to the public. *See e.g.*, Domestic Fixed Satellite Earth Stations - Alaska Bush, 81 FCC 2d 304 (1980), concerning our rulemaking powers under such circumstances.

[15] Orbit Deployment Plan, *supra* note 13 at 598. In the past, applicants have requested identical locations in the orbital arc. We have, however, resolved these conflicts through our processing procedures and orbital assignment orders. For example, in a previous conflict over orbital locations, the Commission has found in GSAT's favor with respect to the particular locations at issue. *See* GTE Satellite Corporations, 84 FCC 2d 562 (1981) and Satellite Business Systems, 86 FCC 2d 180 (1981). GSAT is now using these decisions to support its claim of mutual exclusivity. However, those decisions simply resolved a controversy between the two parties. Although we indicated the desirability of GSAT's satellites being located within a specific portion of the orbital arc, we were focusing only on the accommodation of GSAT's initial in-orbit satellites. Engineering analyses were submitted in those proceedings that demonstrated that operations outside of the desired portion of the orbital arc were feasible, and we made no finding that service would be inadequate if GSAT's satellites were located outside of this portion of the orbital arc. Thus, GSAT cannot use the rationale of those decisions as support to limit its additional GSTAR satellites, which are to be used to satisfy growth requirements, to a particular portion of the orbital arc. Growth satellites carry only a portion of the total system traffic, and services can be routed over any of the multiple satellites within the system which provides an adequate signal quality. Thus, growth satellites can not have the same constraints as the initially authorized satellites over which all traffic must be routed during the start-up of the system. Rather, these additional system expansion satellites often must be located in adequate, though less than optimum, orbital positions, if they are to be accommodated at all.

result has been an industry that has served the public interest through the timely implementation of facilities and services.

20. Similarly, just as *Ashbacker* is inapplicable in this instance because no mutual exclusivity exists, the holding of *Kessler* is not inconsistent with our *Order*. In *Kessler*, the court affirmed the Commission's imposition of a "freeze" on acceptance of applications, but created a limited exception for mutually exclusive applications timely filed, pursuant to our rules, after the freeze. The Court concluded that:

> [I]f a grant of a pending application is to be considered under existing standards, the public interest would demand that mutually exclusive applications timely tendered be also considered in a comparative hearing designed to ascertain the applicant best qualified to provide the broadcasting service involved. *The Commission will of course exercise its judgement as to whether mutual exclusivity does in fact exist in the case of any applicant claiming it. . ..*

326 F.2d at 688 (emphasis added). The court was concerned that "the substantial effect of a contrary view would be . . . to freeze new applicants out of a right of substance—the comparative hearing . . .." *Id.* However, we have already established that GSAT's requests are not mutually exclusive with the applications filed before May 18, 1982. Thus, the limited exception created in *Kessler* is not available to GSAT[16]

21. In addition to not infringing upon the rights of later applicants, our decision to "freeze" the inclusion of additional applications into the current processing group was reasonable and consistent with the public interest. Such a group of applications was required at that time for a number of reasons. For example, the *Order* was necessary to make the complex procedure of processing satellite applications a more manageable task. Processing such applications in groups lends more certainty and administrative efficiency to the pleading cycles because issues raised in the pleadings are often interrelated. Group processing avoids the problems caused by applications being filed over a period of several months, as had occurred prior to the adoption of our processing *Order*, which result in overlapping pleading cycles with numerous

[16] We disagree with GSAT's assertion that our *Order* was an unlawful cut-off procedure. Cut-off procedures, such as Section 1.227(b) of our rules, are intended to deny *Ashbacker* hearing rights to untimely filed applications so that the licensing process will function smoothly. These procedures are adopted by the Commission to insure an orderly discharge of the Commission's administration of its statutory licensing responsibilities. *See, e.g.*, Ranger v. FCC, 294 F.2d 240 (D.C. Cir. 1961). Unlike a cut-off procedure, the *Order* at issue does not seek to—nor does it—deny any applicant any hearing rights it may have under *Ashbacker*, or any rights it or any petitioner may have under Section 309(e) of the Communications Act. Such rights are fully preserved under our *Order* and the further processing order we are adopting today. *See* Memorandum Opinion and Order, FCC 83–185. Because we can no longer warrant the absence of mutual exclusivity, today's processing order will provide a 60 day notice period, from the publication of our Report and Order, for the filing of applications.

and duplicative pleadings being filed. Group processing procedures in the past have proven very useful.[17] Additionally, in assigning orbital locations, it is helpful to take into consideration a well-defined set of satellites so that launch schedules and particular design characteristics, such as cross-polarization and power levels, can be used to maximum effectiveness.[18] Finally, having a well-defined group of satellite proposals was necessary to effectively complete the technical and computer analyses required for our determinations on reduced orbital spacings in CC Docket No. 81-704.[19] Thus, to avoid the need to begin anew the complex evaluation process each time a new and interrelated application was filed, as well as to achieve an effective outcome in the associated rulemaking on orbital spacings, a group processing procedure was adopted.

22. Moreover, our decision to define the current processing group without prior notice was not erroneous. As we explained in the processing *Order*, we feared that prior notice would trigger the filing of many speculative and hastily prepared applications for new and expansion satellites.[20] This could have precluded the timely availability of any new satellites to meet growing service demand if lengthy hearings had to be conducted before any applications were granted.[21] Second, the necessity of undergoing the expense and delay

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[17] *See e.g.*, Domestic Fixed Satellite Service, *supra* note 9.

[18] In the event orbital reassignment becomes necessary, it is easier and less disruptive to users to accomplish this at the time a satellite is launched and initially positioned in orbit, rather than halfway through the life of a satellite. Having a well-defined group of applications and launch dates allows the Commission to devise an orbit assignment plan in an orderly fashion. It also minimizes the contingencies for which the Commission must plan to minimize disruption of service to users.

[19] At the time the Commission adopted the present processing *Order*, it was in the midst of its CC Docket No. 81-704 rulemaking proceeding to reduce orbital spacing, as promised in the *1980 Processing Order*, *supra* note 9. CC Docket No. 81-704 was initiated to reduce satellite separations to the smallest practical values. This would permit the authorization of the largest number of satellites without excessive costs or delays. In the past, a more generalized approach had been used to determine orbital spacings. Adjacent satellites could be operated independently of nearby satellites under this licensing procedure. However, with the number of additional satellites needed to satisfy user requirements, this approach no longer works satisfactorily. To achieve its objectives, the Commission recognized in CC Docket No. 81-704 that the specific characteristics of the satellites and services should be taken into account.

[20] We note that there was no legal prohibition to our granting, without notice, each application as it became ripe for action. These applications could have been granted subject to the outcome of CC Docket No. 81-704. We opted, instead, for a group processing approach. This approach avoids the confusion and uncertainty that might have resulted from incremental adjustments to each succeeding version of the plan of orbital assignments as orbital locations were reassigned to accommodate each newly granted proposal.

[21] As a result of the reduced spacing criteria adopted today in CC Docket No. 81-704, there are sufficient orbital locations to satisfy all requests on file prior to the adoption of our processing *Order*. Additionally there will be several locations

of comparative hearings could have discouraged new entrants from prosecuting their applications.[22] Third, it could have complicated and delayed the making of informed determinations on reduced spacing in Docket No. 81–704 if comparative hearings had to be concluded before the new group of satellites could be finalized. Consequently, we believe these important public interest considerations justified our dispensing with prior notice before freezing the applications to be included in the current processing group.

23. Finally, we are unable to find that prejudice has resulted either to GSAT or to the public as a result of our procedures. The alternative processing plan advocated by GSAT would likely have encouraged speculative applications and resulted in the necessity of performing some type of comparative analysis of all applicants. Thus, it is not as a result of the procedure we have followed that GSAT may now be subjected to comparative hearings. If we considered together all applications on file, along with any applications that may be filed during the discrete period suggested by GSAT, conventional hearing delays and costs would likely be entailed. Thus, many years could have been required before the satellites are constructed and launched. Furthermore, since the entities to be accommodated would not be identified until the conclusion of the hearing, optimal orbital spacing criteria or deployment plans could not be established because we would not have a finite set of baseline transmission parameters and satellite designs to analyze. The result would be to the serious disadvantage of those applicants who filed prior to May 18, 1982, whose plans could be delayed substantially.[23] [24] Ultimately, it is service to the

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remaining under the current deployment plan to satisfy at least some of the requests of applicants who file subsequent to the adoption of our *Order*. However, if we were to group together all applications filed both prior to and subsequent to the adoption of our *Order*, along with any filed during a notice period, there would likely be more applications filed than orbital locations available under present standards. Many of these applications could be expected to be of a speculative nature.

[22] Often long, drawn-out comparative proceedings discourage new entrants from prosecuting their applications. Thus, to encourage new entry, as has been our policy, we have attempted to fashion our licensing procedures in a way that avoids the administrative delay and expense of comparative hearings. *See also* note 24, *infra*.

[23] It should be noted that GSAT, having benefitted from our earlier *1980 Processing Order*, can hardly claim surprise at the current one. Additionally, GSAT had approximately two years in which to file applications for additional satellites. Applicants who have filed in opposition to GSAT's petition have had their applications for satellites in the 12/14 GHz band on file for at least two and one-half months before GSAT filed its applications, and in the case of one applicant, eight months.

[24] New entrants into the domestic satellite market are more likely to be vulnerable to long delays in the granting of their applications than are existing operators. Delayed market entry can only retard the development of a new operator's competitive position in the market and concomitantly strengthen the position of existing operators. If an operator has no facilities to offer, it cannot compete.

public that would be delayed. This would impede our ability to fulfill our responsibilities under Section 1 of the Act. Additionally, it is not evident that any overriding public benefit would accrue from considering all of these applications together. Even if we could thereby assure ourselves that grants are awarded only to the best qualified applicants, this possible benefit would be more than offset by the harm to the public interest that would result from incurring substantial delays in the commencement of any additional satellite service.[25] We will, of course, attempt to take action on GSAT's requests for additional locations, as part of the next processing group, within a time frame that does not unduly disrupt its planning process. However, we will not disrupt the plans of other applicants who require a decision at an earlier date, nor delay needed services to the public, to do so for GSAT's benefit.[26]

IV. *CONCLUSION*

24. Sections 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§ 154(i) and (j), afford the Commission wide discretion in establishing procedures to facilitate the orderly conduct of its business. It is well settled that the choice of agency procedure is committed to the agency's discretion.[27] Such principles are particularly important in

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GSAT has two orbital locations assigned to satellites currently under construction. Additionally, if Southern Pacific Company is permitted to transfer control of Southern Pacific Communications Company and Southern Pacific Satellite Company to GTE Corporation, GSAT's parent would control three additional orbital locations. Thus, GSAT, unlike the several new operators who are today being authorized their first orbital locations, will not be prevented from participating in the domestic satellite industry until its applications are acted upon. Delays to new entrants, on the other hand, would adversely impact the public interest to the extent that it would be antithetical to our competitive goals for domestic satellite service.

[25] We note that, through its passage of recent amendments to the Communications Act that allow the use of lotteries in initial licensing proceedings, Congress has expressly recognized the significant public interest in expediting service to the public, particularly in those instances where there may be a large number of mutually exclusive applications. House Report no. 97–765, 97th Cong., 2d Sess. 37 (1982). Therefore, whether or not we ultimately determine that lotteries are an appropriate mechanism for awarding licensees in the domestic satellite service, we believe that Congress has manifested a clear intention that the Commission, when fashioning its procedures, give appropriate recognition to the substantial public interest in assuring early commencement of service to the public. *See also* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

[26] Actually, GSAT requests authority to construct its fourth satellite as a ground spare, which is "subsequently (subject to further Commission approval which GSAT will seek at a later date) to be launched and operated . . . at 100° W.L. or, contingently, at 98° W.L.". Application at p. 13. It has not been our practice to reserve orbital locations without a formal application before us. Thus, until GSAT files a formal application requesting authority to launch and operate its fourth satellite, we will treat its application in the same manner as we treat all applications for on-ground spares.

[27] FCC v. Pottsville Broadcasting Company, 309 U.S. 134 (1940).

the domestic satellite industry where start-up costs are high and lead times enormous.[28] Thus the Commission has consistently fashioned procedures and technical criteria to allow all qualified domestic satellite applicants to be accommodated with adequate orbital assignments. Frequency and orbital solutions have been devised that serve the public interest even if the resulting orbital assignments are not the same as those requested by the applicants.[29]

25. GSAT has not been deprived of any substantive rights by our *Order*. It has already been assigned two orbital locations in the portion of the orbital arc it finds most desirable. The applications it filed after that *Order* are not mutually exclusive with those we grant today. When processing of GSAT's applications for additional satellites is completed, GSAT will have been afforded all due hearing rights with those applicants in the next group of applications. The procedures we have used in authorizing additional satellite facilities are designed to satisfy unmet consumer demand in a timely manner and thus most consistent with our statutory responsibilities. To reconsider our *Order* and adopt GSAT's proposed modification could unduly delay satellite service and thus would not serve the public interest, convenience and necessity.

26. Accordingly, IT IS ORDERED, that the Petition filed by GTE Satellite Corporation for Partial Reconsideration of our May 18, 1982 *Memorandum Opinion and Order*, 90 FCC 2d 1 (1982), IS DENIED.

27. IT IS FURTHER ORDERED that the Secretary of the Federal Communications Commission shall cause this order to be published in the Federal Register at the earliest practical date.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

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[28] United States v. FCC, note 25, *supra*.

[29] *See, e.g.*, Orbit Deployment Plan, *supra* note 13. In particular, we have consistently declined to assign a single operator multiple orbital locations capable of serving all 50 states simply because the applicant requests such assignments. *See, e.g.*, RCA Global Communications, *supra* note 13; COMSAT General Corporation, 69 FCC 2d 1278 (1978); Western Union Telegraph Company, 47 FCC 2d 274 (1974).

Common Carrier, Interconnection
Common Carrier, International Record Carriers
Telex

Commission allows reconsideration for two issues relating to interconnection arrangements between and among domestic and international record carriers, as prescribed in *Interim Order*, 89 FCC 2d 928 (1982) but denies reconsideration on all other issues raised by petitions.
–*Interconnection Arrangements*
GC Docket No. 82–122

FCC 83–84

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Interconnection Arrangements Between and Among the Domestic and International Record Carriers	CC Docket No. 82–122

MEMORANDUM OPINION, ORDER AND REQUEST FOR FURTHER COMMENTS

(Adopted March 3, 1983 Released April 11, 1983)

BY THE COMMISSION:

1. Before the Commission are petitions for reconsideration of our *Interim Order* [1] which implemented the requirements of the Record Carrier Competition Act of 1981[2] (RCCA) and of our subsequent memorandum opinion and order which rejected tariff filings found to be in conflict with the *Interim Order* and the RCCA (*Rejection Order*).[3] (A list of the petitions, oppositions, and replies is set out in the Appendix.) For the reasons discussed below, we affirm the conclusions in the *Interim Order* in most respects, including the allocation formula for outbound international telex, the pro rata allocation for inbound international telex, the 15% discount for carrier-carrier interconnection, and the use of tariffs to implement

[1] Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 928 (1982), review pending, Western Union v. FCC, D.C. Circuit No. 82–1502, filed May 4, 1982.
[2] Pub. L. No. 97–130, 95 Stat. 1687 (1981).
[3] 91 FCC 2d 483 (1982), review pending TRT v. FCC, et al., D.C. Circuit Nos. 82–1658, 82–1698. 82–1699, filed June 14, 1982.

prescribed interconnection arrangements. We do grant reconsideration with respect to the lawfulness of two "grandfathered" contracts and a request that we allow carriers to agree, on a bilateral, tariffed basis, to accept termination charges lower than those prescribed. We also request further comments on achieving dialing stage access parity.

BACKGROUND

2. The Record Carrier Competition Act of 1981 (RCCA) repealed and replaced the former Section 222 of the Communications Act. The RCCA represents a ratification by Congress of the Commission's procompetitive initatives of recent years and an attempt to remove the restrictions upon entry and competition that the former Section 222 had imposed. Congress has concluded that, after a transitional period in which some rather complicated regulatory oversight will apply, most domestic and overseas record services will be competitive and will require minimal regulation.

3. The former Section 222, adopted in 1943, authorized the merger of Western Union with its domestic competitors so as to create a monopoly domestic record carrier; it also required Western Union to divest its overseas operations as part of the price for this monopoly. In the years following 1943, a relatively rigid division grew up between domestic and overseas record services. Western Union offered domestic services, and originated and delivered international traffic. But it could not offer overseas service and was required to hand off outbound overseas traffic to the international record carriers (IRCs) for delivery in countries overseas. The handoffs and divisions of revenues for such service were subject to complex formulas.[4]

4. The IRCs were not so rigidly confined. Although they concentrated on international service, they also operated offices in "gateway" cities and were authorized to pick up and deliver messages and other traffic in those cities without the participation of a domestic carrier. They did not offer purely domestic service, however.[5]

5. In recent years, the Commission has tried to erase the line separating domestic from overseas record communications and to inject new competition into each of these markets.[6] Part of its effort

[4] The former Section 222 had been interpreted as a perpetual bar to Western Union's participation in international service. *E.g.*, ITT v. FCC, 635 F.2d 32 (2d Cir. 1980).

[5] For background on the scope of IRC operations, see Western Union v. FCC, 665 F.2d 1126 (D.C. Cir., 1981).

[6] *See, e.g.*, Overseas Communications Service, CC Docket No. 80–632, 84 FCC 2d 622 (1980), seeking comments on whether AT&T should be authorized to provide international record service.

was to attempt to let Western-Union into the overseas business.[7] Another part was to get the IRCs into domestic service.[8] Still another part was to authorize new carriers, such as Graphnet, Inc., in both markets.[9] In part because of the reluctance of foreign governments to interconnect with new carriers, competition in the international market still is limited, with three carriers—ITT, RCA and Western Union International (WUI)—dominating the market.

A. *The Record Carrier Competition Act.*

6. The purpose of the RCCA is to "promote the development of fully competitive domestic and international markets in the provision of record communications service." 47 U.S.C. § 222(b)(1). See also H.R. Rep. No. 97–356, 97th Cong., 1st Sess 4 (1981). (House Report). The RCCA permits the FCC to authorize Western Union to compete with the IRCs in the international market. It authorizes the IRCs to compete with Western Union in the domestic market. It requires a record carrier having significant domestic and overseas operations to treat its own domestic and international services as if those services were provided by separate entities, and to interconnect with other carriers for domestic or international services upon the same rates, terms, and conditions it applies to its own services.

7. These are the permanent structural guidelines established by the RCCA. The RCCA also contains transitional mechanisms which are effective for three years after enactment. Specifically, the RCCA requires all record carriers to provide interconnection with other record carriers upon reasonable request and it directed the Commission to convene a meeting of the IRCs for the purpose of negotiating a "just, fair, and reasonable" interconnection agreement. 47 U.S.C. § 222(c)(1)(A)(i) and (c)(3)(A). Congress also provided that the agreement must contain both a formula for allocating revenues among the participating carriers and a method for distributing inbound traffic. Under Section 222(c)(2), the interconnection agreement must "establish a nondiscriminatory formula for the equitable allocation of revenues derived from [the use of interconnected facilities] between the parties to [the] agreement."

8. In adopting the RCCA, Congress was concerned that domestic competition might be limited by the continued unwillingness of foreign administrations to interconnect with new IRCs. House Report at 10. Accordingly, it devised a method by which a carrier without a foreign operating agreement could interconnect with

[7] Western Union Telegraph Co., 75 FCC 2d 461 (1980), *rev'd. sub nom.* ITT World Communications v. FCC, 635 F. 2d 32 (2d Cir. 1980).

[8] International Record Carriers' Scope of Operations, 76 FCC 2d 115 (1980), *aff'd. sub nom.* Western Union v. FCC, 665 F. 2d 1126 (D.C.Cir. 1981).

[9] Graphnet Systems, Inc., 71 FCC 2d 471 (1979). *aff'd. sub nom.* Western Union v. FCC, 665 F. 2d 1112 (D.C. Cir. 1981).

another IRC with such an agreement. That IRC would transit the outbound traffic to the foreign administration. The allocation of inbound traffic is governed by Section 222(c)(1)(A)(ii). In enacting that section, Congress was concerned that the foreign authorities' methods of allocating traffic inbound for the United States among the IRCs might have an inhibiting effect on competition. Believing that "in these situations, no free market exists" (House Report at 11), Congress provided that an originating carrier that has interconnected with another IRC (a "transiting carrier") to provide outbound international service is entitled to a pro rata share of the transiting carrier's inbound traffic. 47 U.S.C. § 222(c)(1)(A)(ii)(1). As noted above, the sections of the RCCA concerning interconnection arrangements, including international transiting and pro rata return flow, expire three years after enactment. The Commission would then retain its general regulatory authority over carrier interconnection, which is not diminished by the RCCA.

9. Congress insisted that these provisions be implemented rapidly. It directed the Commission to convene a meeting among record carriers within fifteen days, and required the carriers to conclude the agreement within a maximum of ninety days. 47 U.S.C. § 222(c)(3)(A). In the event of a failure to agree within that time, Congress directed the Commission to issue an interim or final order establishing an agreement consistent with the purposes of the Act no later than ninety days following the date that the meeting between the carriers was originally convened. 47 U.S.C. § 222(c)(3)(B).

10. Thus, the RCCA erased the ban on a single carrier providing both domestic and international record communications and it required full interconnection among carriers. Prior to 1981, domestic customers of the IRCs could not use their telex machines to call other domestic customers or to make international call via other IRCs. Western Union's customers could select an IRC for international calls, but were forced to pay higher rates than the IRCs' own customers because Western Union's domestic rate was added to the IRC's unbundled country-to-country rate. Now, the IRCs and Western Union compete both domestically and internationally. A telex customer of any domestic carrier may select any IRC that it desires to transmit a message overseas and the rates of both carriers are unbundled. That transmission may involve a single carrier or it may, under the RCCA, involve as many as three different U.S. entities: the domestic carrier, the IRC chosen by the customer (the originating IRC), and the IRC that carries the international call to the foreign administration (the transiting IRC). A telex customer may also call customers of other domestic record networks because the carriers are interconnected.

B. *The Commission's Proceedings.*

11. The Commission convened a meeting of the major record

carriers on January 8, 1982, but those carriers failed to reach an agreement within the forty-five day period. Accordingly, on February 25, 1982 the Commission issued a *Notice of Proposed Rulemaking* (NPRM) 47 Fed. Reg. 10863 (1982), which set forth tentative conclusions relating to the prescription of an interconnection agreement and requested comments. After receiving comments, and in light of the fact that the carriers still were unable to agree, the Commission issued its *Interim Order*. Among other things, that order provided an interim formula for allocating revenues from outbound traffic between interconnecting IRCs and an interim method for distributing revenues from inbound traffic. 89 FCC 2d at 961–67.

12. The *Interim Order* construed the RCCA as requiring each carrier which provides both domestic and international record communications services, and which has a significant share of the market for such services, to operate as if its domestic and international offerings were separate, and to interconnect with other carriers in a manner which is equal in type and quality to the interconnection between its separate domestic and international segments. Interconnection with other carriers is also to be made available at the same rates and upon the same terms and conditions. The *Interim Order* prescribed that carriers provide equal interconnection except in cases involving expensive system modification, technological impossibility or equipment unavailability, or unreasonable degradation of service. In those cases, generally equal or comparable interconnection was permitted.

13. For wholly domestic interconnected record traffic, the *Interim Order* adopted the carriers' view that the carrier on whose network the call was initiated would be the originating carrier. The originating carrier is responsible for setting forth the tariff rate, billing customers, and making an equitable allocation of revenues with the terminating carrier, i.e. the carrier on whose network the called party was located.

14. The Commission determined that the existing arrangement for handling interconnected international inbound transmission was reasonable and worth continuing. Under these arrangements, the U.S. international carrier hands off the call to a U.S. domestic carrier for delivery. The international carrier receives a payout from the foreign correspondent and compensates the domestic carrier. The *Interim Order* incorporated these arrangements into the prescription. In the case of outbound international calls, however, the carriers could not agree on which carrier (domestic or international) would perform the functions of the originating carrier. The *Interim Order* assigned this role to the international carrier selected by the customer to carry the message overseas. The international carrier is therefore responsible for tariffing through rates, billing the customer for through service, and compensating the domestic carrier for use of its network.

15. The RCCA also calls for the establishment of a nondiscriminatory formula for the equitable allocation of revenues derived from interconnection. To the extent possible, this allocation is to be based upon costs. The IRCs argued that there are substantial savings to Western Union in providing carrier-to-carrier interconnection, while Western Union contended that there are no significant savings. Without finally resolving this question, the Commission prescribed an interim 15% discount from a domestic carrier's publicly tariffed intra-network domestic rate, as the rate for the performance of interconnected terminating functions on inter-network domestic calls and as the rate for the domestic component of outbound or inbound international calls. The Commission emphasized, however, that this prescription would not prejudge any action that may be taken in any existing or future phases of CC Docket No. 78–97, an ongoing investigation of WU's rate of return and rate structures for telex and TWX services.

16. The RCCA also sought to overcome the difficulties experienced by new carriers in obtaining operating agreements with foreign administrations. It required the tariffing of transiting arrangements for outbound international record services and a pro rata traffic distribution for inbound international record services. The *Interim Order* applied these provisions to require that where IRCs interconnect to handle outbound transiting telex traffic, the originating outbound IRC without an operating agreement would pay the transiting carrier an amount equal to the foreign payout + 1;2 the domestic carrier's charge + 1;2 of the transiting carrier's international component after the foreign payout has been subtracted. In no case, however, may the originating international carrier's share remaining under the formula (i.e., 1;2 the domestic carrier's charge + 1;2 the international carrier's charge after the foreign payout has been subtracted) be less than the amount of the domestic component charge, which the originating outbound international carrier must pay the domestic carrier. For inbound international record traffic, the Commission prescribed that an originating outbound carrier lacking a foreign agreement would be allocated revenues based upon the same pro rata share of inbound traffic as it delivered for outbound carriage. This allocation would be calculated on a country-by-country, service-by-service basis. The allocation of revenues between originating and transiting IRCs would generally follow the arrangement prescribed for outbound traffic.

17. The Commission ordered the IRCs to implement the *Interim Order* by filing interconnection tariffs in conformity with its terms within twenty days. After the Common Carrier Bureau granted a brief extension of time, the IRCs complied. However, upon reviewing the IRC filings, the Commission concluded in the *Rejection Order* that they violated the *Interim Order* in numerous important respects. Consequently, it rejected the tariffs and required the IRCs

to file tariff revisions by June 16, to become effective on June 20. In order to resolve these matters promptly, the Commission prescribed specific tariff language for telex and TWX interconnection to implement the *Interim Order* and the goals of the RCCA. Application of the formula minimum (the requirement that the outbound originating carrier receive no less than the domestic component charge) and of the pro rata provision were stayed pending appeal by the Court of Appeals for the D.C. Circuit, TRT v. FCC, *et al.*, Docket Nos. 82–1658, 82–1698, 82–1699, decree entered July 2, 1982.

DISCUSSION

18. The petitions for reconsideration address a variety of issues arising from both the *Interim Order* and the *Rejection Order*. We will discuss the petitions and the positions of the parties on an issue-by-issue basis.

1. *Use of Tariffs to Implement the Interconnections Arrangements*

19. Under Section 222(c)(3)(A) of the RCCA, the major record carriers were made parties to negotiation meetings presided over by the Commission, and were allowed a total of ninety days to negotiate an interconnection agreement. Had the carriers reached an agreement, it would have been subject to Commission review to assure that it was consistent with the RCCA and did not unjustly or unreasonably discriminate against any record carriers. When the carriers failed to agree, the Commission became obligated "to issue an interim or final order which establishes a just, fair, reasonable and nondiscriminatory agreement . . ." *Id.* The Commission's *Interim Order* met this obligation by prescribing terms for interconnection. The order's conclusions were then implemented by requiring the filing of interconnection tariffs by the major record carriers upon an expedited schedule. As already noted, when the filed tariffs proved inconsistent with the *Interim Order*, the Commission rejected them and prescribed specific tariff language which the carriers were required to file in revised tariffs. Except for the provisions which were stayed by the Court of Appeal, the revised tariffs are currently in effect.

20. WUI contends that the Commission erred when it required that inter-carrier relationships be governed by tariffs. It asserts that when Congress stated in the RCCA that the Commission shall issue an order "which establishes an agreement," it was requiring that interconnection should be governed by intercarrier contracts. WUI contends that the Commission's actions have required WUI to submit to tariffs which might be changed unilaterally, and deprived WUI of a contractual remedy in the event of a unilateral change or a breach of the interconnection agreement. While WUI has no objections to "explanatory" tariffs which inform the public of the

interconnection arrangement, it requests that interconnection terms be embodied in written carrier contracts.

21. We think it clear that WUI misunderstands the regulatory process we have instituted. Although embodied in tariffs, interconnection arrangements are not subject to unilateral carrier action, as WUI believes, but are constrained by the prescriptions in our *Interim Order* and *Rejection Order*. Those orders are binding on record carriers. Any attempt to change the tariff in violation of the formula prescribed by the Commission would be subject to rejection unless and until the Commission modifies its prescription or the prescription becomes stale or the Commission grants a waiver. Thus, the prescriptions embodied in the tariffs cannot be altered by a unilateral filing, as WUI contends, but only by the Commission's decision that a change is just, reasonable, and non-discriminatory. The tariffs are thus in operational effect indistinguishable from the "explanatory" tariffs of which WUI approves. They give public notice of the terms of the Commission's prescription and may not vary therefrom. For example, when we found that the tariffs filed by WUI and the other IRCs did violate the *Interim Order*, we rejected them promptly and out of hand.

22. As a practical matter, use of the tariff process provides a sound and well understood procedural mechanism for implementing interconnection prescriptions. Tariff filings allow for full public scrutiny of the implementation of our prescriptions and enabled us to take immediate action to enforce the prescriptions. Although we could have used contracts for this purpose, we have no specific provision in our Rules for review of carrier contracts. Cf. 47 C.F.R. § 43.51. In order to allow the necessary opportunity for public examination and comment on contracts, we would have been forced to establish a contract review process to perform the same function the traditional tariff review process already performs so well. It also would have resulted in no difference in procedural rights. Either contracts or tariffs could be rejected as unlawful under our orders, and any aggrieved party could bring a complaint under Sections 206–209 of the Communications Act before a federal district court or this Commission seeking damanges for any unlawful act.

23. This Commission has discretion to regulate the interrelationship between carriers by means of either tariffs under Section 203–205 of the Act or contracts under Section 211. *Lincoln Telephone and Telegraph Company v. FCC*, 659 F.2d 1092 (1981). See also *ENFIA*, 71 FCC 2d 440 (1979). Nothing in the legislative history indicates that Congress had any preference for one form of regulation or the other. Nor does the legislative history indicate any intent to alter the Commission's discretion as to which procedural tool (tariffs or contracts) it would employ. Rather, the House Report, at 7, expressly states that the RCCA "should not be construed as affecting the

Commission's authority under any of the other sections of the Communications Act of 1934, as amended."[10]

24. In sum, the use of tariffs to implement the prescribed interconnection arrangements is a reasonable means, and we believe the best means, of carrying out the Commission's responsibilities, as our actual experience has confirmed. The prescribed interconnection tariffs currently in effect guarantee full interconnection to all record carriers on equal terms. We find no merit in WUI's objections.

2. *Allocation Formula*

25. The RCCA allowed the major record carriers to negotiate a just and reasonable formula for allocation of revenues as part of a interconnection agreement. When the carriers failed to reach such an agreement this Commission assumed the responsibility to prescribe such a formula and other terms for interconnection within the 45 day period specified in Section 222(c)(3)(B). This action was undertaken on an expedited basis in response to the Congressional concern that any revenue allocation formula for interconnected traffic be implemented promptly. House Report at 11.

26. In developing the formula for outbound traffic between interconnecting IRCs in the *Interim Order* the Commission first reviewed the legislative history. It concluded that the existing formula for splitting revenues reflected "the greater bargaining power of carriers that have obtained the necessary foreign operating agreements" and that Congress intended "to redress the imbalance between those carriers which have managed to enter into agreements with foreign operating authorities and those carriers which have not." 89 FCC 2d at 961–62. With this Congressional intent in mind, the Commission adopted a formula which was similar to one proposed by RCA and explicitly endorsed by ITT. No other IRC objected to RCA's proposal. Under this proposal, two IRCs interconnecting to provide international service would share equally the revenue remaining after the payout to the foreign government (i.e., there would be a 50;50 split) with a minimum payment to the transiting IRC of 30 cents per minute. *Id* at 962.

27. The Commission accepted the IRC's proposal with certain modifications. The Commission adopted a formula which first required the originating outbound IRC to pay the transiting IRC the amount of the payout to the foreign administration. Second, the originating outbound IRC would pay the transiting IRC 1;2 of the applicable domestic rate plus 1;2 of the transiting carrier's international rate after subtracting out the amount of the foreign payout. Third, the originating outbound IRC would also pay the domestic

[10] See, Cong. Rec. E1034 (daily ed. March 17, 1982) (remarks of Rep. Wirth):

"All of the powers of the Commission remain, those in Section 201, as well as those contained in other sections of the act."

carrier the applicable rate for the domestic haul. In effect, the formula, like the one proposed by RCA, required a 50;50 split of the post-settlement collection, and required the originating outbound IRC to pay the domestic charges out of its half. Fourth, the originating carrier's division under the formula is subject to a "floor" which requires in all cases that such share must be no less than the domestic charge.[11]

28. The major IRCs, ITT, RCA, WUI, TRT, and FTC have expressed varying degrees of opposition to the formula itself. However, their primary challenge centers about the addition of the "floor." The IRCs argue that the floor will often leave the transiting carrier with less than a 50% share of the total U.S. retained revenue and, in some cases, with an amount which does not cover the costs of providing service. They also assert that the Commission's proposal appears to premise the compensation for the transiting carrier on the revenue actually collected and argue that the originating carrier could set its customer rate so low that the transiting carrier would be denied any compensation.

29. We believe the objections raised by the IRCs to the floor are based to a large extent upon a misunderstanding of how the floor in the Commission's formula will operate. The formula determines how much the originating international carrier must pay the transiting carrier and the domestic carrier. The decision of an originating carrier to raise or lower its rates will affect the amount it receives for handling an international call but will have no impact upon the amounts it must pay to the other carriers who participate with it carrying this traffic. This is because the formula, including the floor, is based solely on the charges of the transiting carrier and the domestic carrier and is completely independent of the rates charged by the originating international carrier to its own customers. In this respect, the Commission's formula is identical to the formula proposed by RCA. There is thus no substantial possibility of manipulation of the formula by the originating carrier to secure an unfair advantage over the transiting carrier.

30. The establishment of a floor was necessary to protect the originating carrier from either out-of-pocket losses or erosion of its revenues for providing the domestic haul. Although, as already noted, the amount the originating carrier receives is based on its own rates and not upon the division under the formula, we believe that as a practical matter the rates the originating carrier can charge are

[11] There is no similar "floor" for the foreign payout, because where the domestic floor applies a transiting IRC will not in any case get less than the share of the international rate that it had negotiated with the foreign administration in question. In some cases, the negotiated foreign payout exceeds the United States IRC's total international segment rate even without regard to the floor. The IRC makes up the loss from traffic in the other direction. The floor would not change this negotiated revenue loss, but it also would not cause it.

constrained by the rates of other international carriers—primarily the IRCs who have operating agreements. Customers are unlikely to rely upon a carrier without an operating agreement when they can obtain the same service directly and more cheaply from the carrier which has the necessary foreign authority. For this reason, we have assumed that a carrier requiring transiting cannot realistically charge more for its service as a general rule (and it may well be compelled to charge less) than the rates of the transiting carrier itself.

31. Assuming that the originating carrier charges the same rate as the transiting carrier, the floor insures that the originating carrier will not suffer an out-of-pocket loss in handling traffic for which the domestic portion of the charge must be paid to a separate carrier.[12] Where the originating carrier is also the domestic carrier, the floor seeks to ensure that the originating carrier is not penalized for being selected by the customer as the carrier to provide international service. Thus, with the floor, the carrier providing the domestic haul does not lose part of its domestic revenues because it is also selected as the international carrier.

32. In all cases where the floor is applied, the originating carrier receives nothing for the provision of the international haul. On the other hand, in all cases where the floor is applied, the transiting carrier receives the same amount as it would have received had it been selected by the customer to provide international service. In other words, the transiting carrier will receive no less revenue when the floor is applied than if it had provided the service itself rather than as a transiting carrier.

33. Properly understood, the floor cannot be regarded as inequitable or unfair to the transiting IRCs. To the contrary, we believe that the floor is a necessary adjustment to any reasonable formula, that it will help promote competition by fostering open entry, and that it will help carry out the intent of Congress in enacting the RCCA to redress the imbalance between carriers that have operating agreements and those that do not.

34. The one example that ITT has proposed to show how the floor supposedly would harm it provides an excellent illustration of why the floor is necessary. Under ITT's tariffs, the charge for service to Japan is $1.83 for the international segment. The foreign payout to the Japanese administration is $1.81. The domestic segment,

[12] Conversely, where the originating carrier decides to charge a lower rate than the transiting carrier, it is not protected from suffering an out of pocket loss. There is accordingly no possibility of manipulation by the originating carrier through charging very low rates. As a general matter, it cannot pass its losses off to the other carriers participating with it in the haul of international traffic.

which may be provided by any domestic carrier including ITT, is approximately $.40.[13] If no transiting arrangement were involved, ITT would pass on the $.40 to the domestic carrier, pay Japan $1.81 as the foreign payout, and retain two cents as its own share of the revenues. Under the formula, where another carrier was the originating international carrier, ITT would receive the foreign payout of $1.81 to pay the Japanese administration, plus half the domestic charge and half the two cent retention, or $.21 ($.40 plus $.02 divided by two.) However, because this would leave the originating carrier with only $.21 under the formula and the originating carrier, not ITT, would have to pay $.40 to the domestic carrier, the floor would be applied. As a result of the floor, the originating carrier would be entitled under the formula to the amount of the domestic charge, $.40, but would then pay all of this to the domestic carrier. It would have zero net revenue. ITT, on the other hand, would retain the same two cents it would have gotten if it had provided the service itself without the participation of another carrier using its transiting services.

35. Without the floor, ITT would retain $.21, or more than ten times as much as it retains for an ordinary call made by a customer of its own. Assuming the originating carrier would have to match ITT's rate to be competitive it would suffer a $.19 out-of-pocket loss while ITT would receive a $.19 windfall. As ITT's own example shows, when corrected to apply the floor accurately, the floor is far from being unfair.

36. The effect of the formula without the floor would be much worse for interconnecting carriers than the pre-RCCA arrangements for interconnection made available by the IRCs. Before implementation of the RCCA, the originating carrier received a discount of 12 cents from ITT's end-to-end rate. Since the originating carrier provided the domestic haul to its customer in gateway cities it did not have to pay anything to another domestic carrier. It could match ITT's end-to-end rate and provide the domestic service with the additional 12 cents, though this might not necessarily cover its full costs. Under the RCCA, the originating carrier must ordinarily interconnect with all other domestic carriers on the same terms as with its own domestic component. It cannot keep the domestic haul for itself and must therefore incur an actual out-of-pocket expense on the domestic portion every time it transmits a message from an interconnected domestic carrier. This is likely to be a large part of a carrier's traffic. Even in cases where the carrier handles the domestic haul itself or lacks a substantial market share and need not interconnect on equal terms with other carriers, the carrier would

[13] In the *Interim Order* at 962–63 we used a domestic rate of $.2954 a minute in this example. That figure did not reflect the 1.3 holding time factor. Domestic rates have also been increased.

incur all the costs of any other domestic carrier for the domestic portion but would be forced to accept much less than carriers such as ITT for the same call. Carriers who offered only international service would of course be wholly unable to recover any of this loss since they would have no domestic revenue at all.

37. Moreover, the application of the IRC's proposed formula could have meant that in some cases the domestic carrier would receive less if a customer chose it to handle the international segment than if the customer chose another carrier. In the case of Japan, for example, the domestic carrier would be assured of receiving its full domestic rate of $.40 from the international carrier unless the domestic carrier was also chosen to provide the international segment. In that case the domestic carrier would receive only $.21. This anomaly, that a carrier must suffer a loss of revenue if it is successful over its competition in obtaining overseas business, plainly discourages the domestic carrier from serving this international route, and would penalize it if it did. It also would frustrate the statute's goal of fostering open entry and would specifically defeat the RCCA's mandated separation of domestic from international services.

38. The formula, even with the floor thus seems to us quite fair to the IRCs, which is natural enough since it is basically the formula they themselves proposed. As Graphnet points out, it is far more favorable to them, for example, than the usual international transiting agreements the IRCs have entered into voluntarily. See para. 49 *infra*. For all the reasons mentioned, we believe that the floor is a minimal and necessary adjustment to the base formula.

39. Even if the IRCs did lose money on some routes as a result of the formula, as they claim but do not demonstrate, this does not necessarily mean the formula is unlawful. The applicable legal test for the adequacy of rates is not whether the carrier will earn a fair return on each and every international route, in both directions, but whether it earns a fair return overall.[14] The IRCs do not claim that they will fail to earn a fair return overall. Moreover, since the formula is based on the IRCs own rates, where they are providing transiting they remain free to alter the revenues they receive by filing to increase their customer rates.[15] They are also free to renegotiate their divisions with foreign administrations.

40. WUI argues that the outbound transiting formula is unfair and unnecessary. It is unfair, WUI claims, because it does not

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[14] *See, e.g.*, New England Divisions Case, 261 U.S. 184, 201–03 (1923), Federal Power Commission v. Hope Natural Gas, 320 U.S. 591, 602 (1944).

[15] There is no need to increase customer rates simply because of the floor, however. If those rates are inadequate to meet the IRCs' costs, the fault is not in floor. The IRCs receive precisely the same share per call with the floor as they receive when they are themselves the originating carriers and the formula is inapplicable.

promote the obtaining of foreign operating agreements but only allocates more revenue to the originating carrier than the current practice of allowing originating carriers a 12 cent retention of the total end-to-end rate. It is unnecessary because the originating carrier can now interconnect its domestic network with international carriers to deliver international calls, and retain the full domestic rate. WUI claims that the Commission has no evidence that the 12 cent retention should be increased.

41. This argument misses the point of what the RCCA seeks to accomplish. The RCCA requires that domestic and international operations generally be treated as separate for purposes of interconnection. Thus, domestic carriers receive a specific rate for interconnected calls. The 12 cent retention was for the total end-to-end call and in effect meant that the carrier requiring transiting received only 12 cents for the total haul since it matched the other IRCs' rates. As WUI recognizes, the RCCA does not permit unfavorable terms of interconnection of this sort. But the RCCA also requires that the IRCs provide transiting for the purely international portion of the call, to allow new carriers to enter and to eliminate the effect of operating agreements as barriers to competitive entry. The function of the outbound transiting formula is to establish fair charges which accomplish these purposes. The present 12 cent retention clearly defeats this purpose, as would accepting the argument that domestic carriers can simply hand off traffic to other carriers. The RCCA requires more than this of the IRCs - it requires that they interconnect to provide transiting to any carrier seeking to provide international service during the three year transition period, not simply that they interconnect with domestic carriers. The transiting formula is necessary to accomplish this purpose and does so, we believe, at a fair rate.

42. WUI also argues that the effort to impose a revenue division formula is in violation of the due process protections of the Fifth Amendment to the Constitution of the United States, which it says are embodied in Section 204 and 205 of the Communications Act, 47 U.S.C. § 204, 205. It characterizes the outbound formula as an arbitrary decision to protect the revenue of the originating carrier at the expense of a fair return by the transiting carrier, without the support of an articulated rationale and in violation of the requirements of Sections 204 and 205. ITT also implies that the Commission is requiring it to provide service at a rate which will not allow it to recover its costs, and that the Commission is bound to conduct a hearing under Section 201 of the Communications Act, 47 USC § 201, to determine the transiting carrier's costs before it can prescribe a compensation scheme.

43. We see no constitutional infirmity as a matter of procedural or substantive due process. Procedurally, due process requires notice and an opportunity to be heard. All interested persons have been

afforded both. We gave notice of our interest to prescribe a formula in the *NPRM* and the IRCs took full advantage of that opportunity. They have also filed comments with their tariff filings and in this proceeding. This procedural scheme was mandated by Congress in the RCCA to meet the special circumstances of record carrier interconnection. We fail to see how the procedure under the RCCA could be constitutionally suspect even if it differed from the procedures under other sections of the Communications Act, as the IRCs argue. Indeed Sections 204 and 205, cited by WUI, have no relevance at all. This formula involves division of revenues between interconnected carrier. Sections 204 and 205 concern review of carrier filings and practices and in any event require only "a full opportunity for hearing", which can be a notice and comment hearing. Section 201(a) governs carrier interconnection and revenue divisions. That section also requires, procedurally, only an opportunity for hearing which the IRCs have received, as our orders in this docket demonstrate.

44. We are also confident that the formula is not confiscatory and does not require the IRCs to provide service at a rate below costs, in violation of substantive due process. As we have pointed out above, the formula only divides rates in a manner largely similar to that proposed by the IRCs themselves, and is based on the IRCs own rates. The IRCs remain free to increase their transiting and overall revenues by increasing their rates. As we have also explained, the effect of applying the floor, the IRCs' major objection, is only to limit the IRCs to the same revenues they receive from their own customers under their own voluntary rates. Such rates can hardly be considered governmental confiscation.

45. Ironically, ITT seems to urge that we undertake a full investigation of IRC transiting costs before prescribing any formula. Yet, ITT has vigorously opposed the Commission's efforts to determine ITT's own costs.[16] The IRCs generally do not keep the detailed books or records which would be necessary to prescribe, with any degree of confidence, cost based rates for specific services. The proceeding required to develop this information could probably not be completed within the three year expiration period which Congress has established for the prescription of rates under Section 222(c) of the RCCA. Congress directed that interconnection was to be based so far as possible on costs, but that a division of revenues formula be implemented within 90 days at all events if the carriers themselves could not agree. The IRCs have provided no data on costs, either in response to the *NPRM* or in this proceeding, which would indicate that the formula would cause them to suffer a loss on any route or in any direction, except to the extent that they choose to accept losses under their own tariffs. Manifestly, they have not shown that the

[16] See ITT World Communications Inc., CC Docket No. 80–633, 88 FCC 2d 701 (1981).

formula is confiscatory under the constitutional test that the carrier may not be deprived of a fair overall return.

46. We thus do not perceive that the formula with the floor could operate unfairly toward the IRCs. But in any event the formula is interim in nature. If the IRCs can demonstrate unfairness in fact we can modify it. Finally, each IRC has another remedy. If it believes that the formula is unfair to transiting carriers, it can operate instead as an originating carrier. Thus, if an IRC believes that it would receive an inadequate division as a transiting carrier, it can cease to provide service over its own facilities to a particular point, or even generally, and use the facilities of the remaining carriers who would continue to provide transiting service. These carriers would presumably charge, and, if necessary, raise rates to a level sufficient to cover the cost of providing such transiting service. Accordingly, under the reserve settlement that we have prescribed, the transiting IRC with its own international facilities and operating agreements with foreign countries can be no worse off than the carriers without such specific operating authority. If an IRC perceives that the carriers without operating authority are receiving undue benefits, it can place itself in the same position and use the transiting facilities of other carriers.

47. TRT also points out that the RCA proposal contemplated that the IRCs would retain all inbound traffic, while the Commission applied the formula to inbound traffic under the pro rata requirement. However, this does not make the formula unreasonable. The IRCs may be less well off because the benefits they obtain from outbound traffic are reduced during the transition period. But this was Congress' intent in implementing the pro rata requirements, as we discuss in the next section. We point out again that whatever the division of revenues between the carriers, the IRCs remain free as usual to adjust their customer rates to achieve an adequate return, or to seek transiting arrangements themselves.

48. We recognize that the interim formula is not based on specific evidence as to cost of service. It was obviously not possible to develop the data required to set such rates in the brief period available to us to meet the Congressional deadlines. The House Report clearly expresses the Congressional intent:

> In the event that the carriers are unable to negotiate an agreement for the division of revenues within the timetable established by the bill, the FCC is empowered to prescribe a division rate that, to the extent possible, is cost based. The Committee's overriding concern, however, is that such prescription takes place within the timeframe established by the bill.

By accepting the IRCs' proposed formula, with what we believe are necessary modifications, we hoped to implement the mandate of the RCCA in a practical fashion. The IRCs make no showing that the formula as modified fails at this purpose.

49. Graphnet proposes an alternative formula which it says

approximates presently established worldwide transiting arrangements. Graphnet claims the generally accepted practice for international transiting is that the originating carrier pays the transiting carrier 2;3 of the established accounting rate. The transiting carrier would then retain 1;6 of the accounting rate and pay 1;2 to the foreign administration. The originating carrier would retain 1;3 of the accounting rate. The effect of this proposal would be to increase the amount retained by the originating carrier at the expense of the transiting carrier. The other IRCs oppose this proposal as overly generous, but do not appear to dispute Graphnet's contention that it represents generally accepted international practice. In our view, Graphnet's proposal is not objectionable as a matter of principle. It could be reasonable to adopt an industry practice particularly as an interim measure. However, it is unclear what the actual effect of Graphnet's proposal would be. As is the case with other aspects of our *Interim Order*, we are not disposed to modify what seems a workable, interim approach in the absence of clear evidence that another approach is superior. For example, we are not entirely certain (despite the IRCs' silence on this point) what the established international practice is, whether the practice is consistently applied, whether such practice represents anything more than the raw bargaining power of the parties involved, or whether the practice is somehow related to costs. In any further proceeding to consider the outbound interconnection formula Graphnet may present evidence that its proposal is more suitable than our own. Since the interim prescribed formula seems to us to strike an equitable balance and since, notwithstanding their objections, it tracks the IRCs' own proposals, we deny the petitions to reconsider it at this time.

3. *Pro Rata Return Flow Provisions*

50. Section 222(c)(1)(A)(ii) of the RCCA provides that interconnection agreements for international record carriers service

> shall require that the allocation of record communications service between points outside the United States and points of entry in the United States shall be based upon a pro rata share of record communications service between points of exit out of the United States and points outside the United States provided by the carrier making such request for interconnection.

There is one exception. The requirement does not apply

> in any case in which the customer requesting any record communications service between a point outside the United States and a point of entry in the United States has the option to specify the international record carrier which will provide such record communications service.

51. In applying this provision in the *Interim Order*, the Commission traced the Congressional intent to allow open entry and full competition in international markets. The pro rata requirement is intended to reduce the inhibiting effect on competition of restrictive

practices of foreign administrations, notably the refusal to negotiate operating agreements. The Commission noted that the means of implementating this intent are less than clear (for example, because network operations are based on delivery of inbound traffic by the foreign administrations at mid-ocean), but rejected IRC arguments that its implementation be delayed or ignored. The Commission also rejected the notion that Congress intended to require the actual physical distribution of traffic at midocean so that it could be divided among the different IRCs in proportion to their outbound traffic. Rather, the Commission concluded that it could

> best accomplish the intent of Congress here by dividing the economic benefit that carriers are entitled to receive for inbound international traffic, so that a carrier, which would otherwise be foreclosed from actually handling inbound international traffic due to the lack of a foreign agreement, may participate in the economic benefits associated with the carriage of such traffic. 89 FCC 2d at 965.

52. We prescribed that carriers who are unable to obtain foreign operating agreements be allowed to receive a pro rata share of the economic benefits of inbound traffic for all record communications service, and concluded that the allocation of revenues should follow the transiting arrangements prescribed for outbound traffic. We also allowed the transiting carrier to elect to effectuate physical delivery to the called party when this would avoid involving an extra U.S. carrier and an additional U.S. switch in the transmission. In these cases, the carrier entitled to the pro rata traffic would receive the same allocation as that prescribed for outbound traffic. We emphasized "that our revenue allocation prescription is interim in nature and one which must necessarily change as circumstances warrant." 89 FCC 2d at 967.

53. The IRCs repeat essentially the same arguments on reconsideration which they raised in their comments to the *NPRM*. ITT argues that the statutory language is so vague as to be a legal nullity, and that the Commission should therefore ignore it. TRT argues that the formula is not authorized by the RCCA because it is a revenue allocation formula and the RCCA provides for a traffic allocation formula. As we said in the *Interim Order*, we believe it is incumbent upon us to discern the intent of Congress with respect to the pro rata provision and to apply the provision in a manner consistent with the overall purposes of its statute. As the legislative history makes clear, that purpose is to facilitate entry into these markets by counteracting the competitive disadvantage that some carriers face because they are unable to obtain operating agreements with foreign administrations. This purpose, we believe, can be reasonably accomplished by a revenue allocation formula. Since it is physically impossible to actually make a distribution of traffic at mid-ocean, we do not read this statute as requiring that this be done.

54. The IRCs argue that the return flow provision of our formula is not consistent with the statutory intent and is unfair. Some IRCs

contend that Congress intended the pro rata provision to apply only in instances where a U.S. IRC actually obtains a benefit in the form of increased inbound traffic from the overseas administrations. ITT argues, for example, that the formula should apply only to increased inbound traffic which is a direct and measurable result of increased outbound traffic provided by the carrier claiming a pro rata benefit; it claims that under this standard a relatively small percentage of overseas points would even be eligible for pro rata treatment. RCA argues similarly that traffic which an IRC handles on a transit basis for foreign administrations should be excluded from the allocation because this traffic is based on negotiated agreements independent of U.S. outbound traffic. RCA argues that since the IRC receive no benefit from foreign administrations for this traffic, the traffic should be excluded from pro rata allocations. WUI says that overseas administrations route inbound traffic in many cases without regard to the IRC's outbound traffic such as a "carrier-of-the-month" arrangement, or a system based on the number of assigned trunks rather than the calls. Moreover, WUI argues that there is always a time lag between increased outbound traffic and the realization of increased inbound return, and suggests that the acquisitions of additional operating agreements by Western Union will dry up any pool of unrouted inbound traffic. WUI submits that the interim inbound formula should apply only when the transit carrier actually receives inbound traffic in excess of the share it would have received as the result of outbound traffic initiated by another carrier.

55. We cannot agree with the contention that Congress intended the pro rata provisions to apply only when the transiting carrier received a benefit from the foreign administration as a result of the outbound traffic received from the originating carrier. The pro rata provision of Section 222 contains no such restriction. By its terms, it applies to all inbound traffic unless the foreign administration allows the customer the option to specify the international record carrier which will provide the service. The IRCs seek to have the Commission add an additional restriction to the statute based on the House Report, which states that the carrier without an operating agreement should receive the benefit of any increased inbound allocation. However, it appears to us that the House Report cites the case where the transiting IRC receives the benefit of increased return traffic as an example of the need for the pro rata provision, not as a limitation on its operation. If Congress had intended the statute to be limited in its effect to countries which allocate traffic in proportion to traffic received it would presumably have said so, by adding a further restriction or exception. It appears to us that Congress intended the transitional, 3 year operation of the pro rata provisions to assure a full opportunity to new, small carriers to gain

a foothold in the international record communications market, despite the difficulty in obtaining operating agreements.[17] We have applied the pro rata provision to give effect to this intent.

56. More fundamentally, the calculation of pro rata shares based on benefits to the transiting IRC is administratively unreasonable, indeed impossible. The IRCs concede as much. ITT states that

> 30 of the countries with which we have direct operating agreements permit subscriber choice of the U.S. record carrier by which the traffic should be routed. This category of traffic is specifically excluded from the *pro rata* return provisions by Section 222(c)(1)(A)(ii)-(II) of the Record Carrier Competition Act. In another 61 countries, the administration allocates traffic among the U.S. IRCs on bases generally known only to the administration; it can, however, reasonably be concluded that such allocations are based on a number of factors other than (or possibly in addition to) the traffic received from the U.S. IRCs, particularly as regards any short term changes in such traffic. Thus, for this group of countries, even if a significant increase in a given IRC's outbound traffic (resulting from traffic routed via that IRC by another U.S. international carrier) were to produce, over the long term, some increase in that IRC's traffic allocation by a given country, it is impossible to measure the specific "benefit" of this increased outbound traffic or to isolate that traffic from other factors which may have influenced the administrations decision. Finally, only 15 countries allocate traffic among the U.S. IRCs in proportion to the amount of traffic which they receive from each of the IRCs.

ITT states that even in the 15 countries which allow proportionate returns there would be substantial administrative problems in applying the pro rata provision based on the benefits theory. At least three different methods are used for determining traffic quotas, and the administrations provide no information on whether the traffic handed off is derived from the quota system or allocated on some other basis. TRT frankly admits that it does not see how a pro rata system based on benefits to the IRCs from outbound traffic could be implemented. It suggests we seek further comments.

57. The pro rata provision applies to all international routes where the overseas customer cannot select the international record carrier to handle the inbound haul. We cannot assume that Congress intended that this broad language be narrowed to a virtual nullity, totally ignored, applied in an unworkable fashion, or delayed indefinitely. These are the options the IRC admit are inevitable under their benefit theory. Moreover, we believe it likely that the carriers do generally derive benefits from outbound traffic even if

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[17] *See, e.g.*, Cong. Rec., H8906 (daily ed. Dec. 8, 1981) (remarks of Rep. Markey):

> We have crafted legislation which provdes for a group for which there is no powerful or well-financed lobby—new entrants into the record carrier industry. In this regard, this bill takes a tremendous step beyond just squaring off the vested interests of a cartel against a monopoly.
>
> We have applied the spurs of competition to a technology which, until now, has fallen victim to monopoly complacency. My hope is that providers of record carrier service and new entrants into this industry will seek to advance this technology and will aggressively and creatively foster the development of new markets.

they are often inchoate. On some routes, the IRCs obtain virtually all of their revenue from the inbound traffic. Japan is one instance. The IRCs necessarily depend upon receiving a fair share of the inbound traffic to make a profit on that route. On this route as on others, the IRCs are very likely to receive more inbound traffic and other favorable treatment from the foreign administrations if they deliver more traffic, even if there is some time lag before this happens, or there is not a direct correlation, or those advantages are difficult to quantify.

58. RCA states that it has no present dispute with the way the Commission has applied the pro rata provisions, but it seeks clarification on the traffic subject to the formula. First, it argues that three types of transit traffic should be excluded from the inbound traffic subject to pro rata: 1) traffic originating in one country and handed off to the IRC by a second country for termination in the United States (e.g., a call from Nigeria, via the U.K., handed off to an IRC for delivery to the U.S.); 2) traffic originated in one country and delivered to a U.S. IRC on a transit basis for termination in a third country (e.g., a call from the U.K. handed off to an IRC for delivery to Japan); and 3) traffic where two carriers provide transiting (e.g., a call from Nigeria, routed via the U.K. and the U.S. to Japan, where a British and a U.S. IRC both provide transiting).

59. We agree with RCA that traffic in cases 2 and 3 which does not terminate in the U.S. should not be subject to the pro rata requirement. Pro rata is to apply to traffic "between points outside the United States and points of entry in the United States." Section 222(c)(1)(A)(ii)(1). Traffic which happens to be physically transmitted through the U.S. to a third country should not be included, for it is not traffic terminating in the U.S. However, upon the same reasoning, traffic which an IRC receives from a foreign administration for delivery in the U.S. is governed by the pro rata provisions even if the traffic originated in another country. Thus, in RCA's case number 1, the traffic should be included in the pro rata allocation. Moreover, since we have directed that the pro rata allocation be determined on a service-by-service, route-by-route basis, the traffic should be included in the file for the actual originating country. For the case mentioned, for example, the Nigeria-U.S. call or its revenues would be allocated in pro rata proportion to outbound U.S.-Nigeria traffic handed off to RCA by the originating IRC.

60. We recognize, on this point, that the IRCs have in the past claimed that they do not know where a call originates. For example, the IRCs have represented that they would not know whether a call handed off to them by the British administration actually originates in the U.K. or in another country. In general, we believe the IRC will in fact know where a call has originated because of its operational and contractual arrangements with the foreign administration. If the IRC actually does not know, however, the call should be allocated

as though it originated at the first foreign point the IRC knows that it passed. Thus, to use the example above, if RCA does not know the call originated in Nigeria, the call should be allocated as though it originated in the U.K.

61. RCA also argues that traffic addressed to the domestic network of the IRC which provides the inbound haul should be excluded from pro rata allocations. It notes that foreign administrations automatically route to each IRC the traffic directed to its domestic network. Only traffic to Western Union's network has in the past been allocated. RCA contends that this practice means that when a foreign customer calls the number of an IRC's domestic customer, the option to specify the U.S. carrier is being effectively exercised. Therefore, it urges, the call is subject to the exception to pro rata contained in Section 222(c)(1)(A)(ii)(II).

62. RCA's argument amounts to a claim that a foreign customer "chooses" an IRC when the foreign administration routes traffic to that IRC in a consistent manner even though the customer knows nothing about it and has no actual option. Unless the U.S. addressee has telex machines connected to more than one U.S. carrier's network, the foreign customer has only a Hobson's choice - if he wants to make the call he must accept the fact that the international portion will be handled by the international operation of the carrier providing the domestic portion. This was not the choice Congress had in mind. We concluded in the *Rejection Order* that the pro rata provision applies except where the foreign administration allows its subscribers to select *any* U.S. international carrier, including those without operating agreements. In the case RCA presents, the foreign customer's choices would be slim or none. Moreover, RCA implies that the pro rata allocation can be based solely on traffic directed to Western Union customers. Of course, Western Union is also now an IRC and unless the entire burden of pro rata is to be placed entirely on its international operations - a result totally at odds with the RCCA's goal of eliminating barriers to entry and flatly discriminatory - the RCA proposal would again render the pro rata provisions practically meaningless. We find no reason to reconsider our implementation of pro rata.

63. The objections of the IRCs to the inbound revenue allocation formula are essentially identical to their objections to the outbound formula, because, of course, the formula itself is identical. We need not repeat our discussion of this point. We would note, however, that using the same formula for traffic in both directions would not only appear to be logical from a cost standpoint, but might also prevent inequitable manipulation of settlement agreements. If different allocation formulas were used for outbound and inbound traffic, the carriers with operating agreements might be able to renegotiate the terms of foreign agreements to take advantage of the disparity for their own benefit and that of the foreign administration, but to the

detriment of the carriers requesting transiting. For example, if the 50–50 split were replaced by a 25–75% split for outbound transiting and a 75–25% split for inbound pro rata, the transiting IRC would have a strong incentive to renegotiate its operating agreements so that it retained all or most of the outbound revenue, while the foreign administration retained a corresponding share of the inbound revenue. Assuming 40 cents per minute is the revenue to be divided between the originating and transiting IRCs, and this is the same for traffic in both directions, each carrier would receive 40 cents in the case of either a 50–50 or 25–75 split. But if the transiting IRC renegotiated the operating agreement with the foreign administration to switch to sender-keep-all arrangement, it would receive 80 cents for outbound calls and nothing for inbound. Under the 25–75% split, the originating IRC would receive only 20 cents altogether and the transiting IRC 60 cents, though there is no difference in cost. Congress sought to eliminate this sort of discrimination and the barrier to entry it represents.

4. *15% Discount for Carrier-Carrier Interconnection*

64. The RCCA provides that "To the extent possible . . . the Commission shall require that [the] equitable allocation of revenues [in the interconnection agreement] be based upon the costs of the record communications service or facility employed as a result of such agreement." Sec 222(c)(2). In the *NPRM*, the Commission noted that there was no creditable evidence of significant cost differences between the services Western Union provided to customers and those it provided to the IRCs. We also recognized that this issue was the subject of an evidentiary hearing in Docket No. 78–97. We invited parties to provide cost data and stated that in the absence of such data we could not conclude that an interim discount from the customer rate was justified. Shortly thereafter, the Administration Law Judge released on initial decision in Docket No. 78–97. The ALJ determined, *inter alia*, that there are cost savings on the order of 20 to 25 percent in providing service to the IRCs as compared with domestic subscribers, because domestic and international Telex/TWX services are provided differently.

65. In the *Interim Order* we noted that the issue of prescribing an interim discount presents a difficult problem because no final resolution of this matter has been made in Docket No. 78–97. Nevertheless, we recognized that the ALJ did find that a substantial discount was warranted and that the House Report disclosed a legislative intent that some discount should be part of a carrier-to-carrier interconnection arrangement. Accordingly, we prescribed an interim discount of 15%, while emphasizing that this decision in no way prejudges any action the Commission might take in Docket 78–97. The discount applies to 1) terminating interconnected domestic calls; 2) initiating and handling off to a second U.S. carrier

international outbound calls; and 3) accepting for delivery from another U.S. carrier international inbound calls.

66. TRT and Graphnet are the only parties seeking reconsideration of the interim 15 percent discount.[18] TRT claims that cost data in the record indicates that a discount of up to 50 percent would be appropriate and that other cost studies showed that a minimum of 20 percent was required. Graphnet similarly argues for a 50;50 split for domestic interconnected traffic or at least a 20 percent discount. Graphnet's petition is largely addressed to the difficulties faced by a new carrier attempting to enter the domestic telex market. It argues that a higher discount is needed to allow new carriers to compete profitably.

67. We find no basis in either TRT or Graphnet's petitions for modifying the interim discount at present. The other carriers have not challenged the reasonableness of the discount and TRT presents no new arguments or information. Graphnet's arguments largely amount to a request for favored treatment to new domestic carriers in order to reduce their costs and rates. The directive of the RCCA, however, is to require interconnection based so far as possible on costs. This should ensure a fair opportunity for new carriers to compete, certainly an opportunity equal to that of a company seeking to enter a typical competitive market. Any modifications of the interim discount should be to align it more closely with costs, not to favor certain carriers regardless of costs. In the absence of any demonstration that some other discount better reflects costs, or of a final determination of that issue in Docket 78–97, we will not disturb the present interim discount.

68. TRT and RCA also raise a related issue. They argue that the Commission should permit carriers voluntarily to implement, on a mutual basis, domestic division arrangements under which the payout to the terminating carrier is less than that prescribed by the Commission. They argue that Western Union will not provide rates and terms of interconnection which open up its near-monopoly network to interconnected traffic, and that if other carriers are allowed to interconnect with one another on more favorable, mutual terms, they will be able to provide a meaningful alternative to Western Union's network. In particular, they may be able to offer increased incentives for customers to join their networks rather than Western Union's. TRT and RCA also contend that there is no basis in the record to prohibit carriers other than Western Union from voluntarily accepting a lower terminating charge than that prescribed. The IRCs and Graphnet had entered into agreements to terminate domestic interconnected traffic at the rate of 10 cents per

[18] Western Union also requests that the Commission rule that refunds will be ordered if the interim discount is modified. Since the issue of refunds, if any, will be decided in Docket No. 78–97, we do not address the issue here.

minute and RCA by letter of April 9, 1982 requested a clarification of whether such bilateral agreements were allowed under the *Interim Order*. The Chief, Common Carrier Bureau, by letter of April 27, responded that he interpreted the 15 percent discount as applying to all interconnected carriers. He noted that no IRC had provided costs and stated "For the time being, therefore, until the Commission has the opportunity to consider this matter further, carriers' interconnection tariffs should reflect the 15 percent discount notwithstanding any pre-existing bilateral agreements." The Commission also rejected such provisions in the *Rejection Order*.

69. Western Union opposes reconsideration of this issue. It points out that the IRCs have still not provided cost data, and argues that they have not shown they will be better off, noting that under a mutual agreement carriers will receive the same net revenue as under the 15 percent discount so long as a carrier's originating and terminating traffic are about equal. Western Union also reasons that if a carrier can show that a 10 cent charge is cost-based, the carrier should offer it to all carriers, not only to those carriers willing to agree to a reciprocal arrangement.

70. The basic choice presented us on this issue is between two policies of the RCCA which are in some tension. On the one hand, the RCCA requires that interconnection be based so far as possible on costs. The bilateral 10 cent arrangements are not based or claimed to be based on the costs of terminating calls. On the other hand, the RCCA seeks to promote competition, minimal regulation, and open entry. The IRCs apparently believe that they can compete more effectively with lower, bilateral domestic interconnection rates, and that entry into the market long dominated by Western Union would be facilitated. Elimination of this restriction would also reduce our regulatory role. Moreover, to the extent that the IRCs lack market power in domestic telex, it can be argued that they should be allowed to discriminate.

71. Weighing these opposing factors, it appears reasonable as a policy matter to allow bilateral arrangements of the sort proposed by the IRCs, so long as the same terms are offered to all carriers seeking interconnection. This course should foster competition and reduced regulation, yet should not substantially depart from the goal of cost-based interconnection. So long as traffic flows between carriers are relatively even in both directions, the overall revenue effect of the bilateral agreement would be the same as the 15 percent discount, as Western Union itself points out. Although use of the 15 percent discount was a reasonable first step to establish functional interconnection, and to prevent abuse by Western Union of its dominant domestic position, we perceive no convincing policy reasons why a carrier may not now voluntarily accept less for interconnection as part of a bilateral agreement, where the overall effect of the agreement, assuming relatively even traffic flows, is as close to costs

as the 15 percent discount. Of course, it is somewhat anamalous for a carrier to make the offering of a tariffed service contingent upon the offering of a similar service by the carrier-customer. But in this case, with its unique problems of carrier-to-carrier interconnection, the practice seems justifiable. However, the IRCs' proposal also presents troubling practical issues. It would, for example, require the IRCs to impose different terminating charges for calls received from different carriers, about 30 cents for some and 10 cents for others. Moreover, since the bilateral rate applies only to domestic calls, terminating carriers would apparently charge 30 cents for terminating all international calls, including those from carriers who are charged the 10 cents rate for domestic calls. The carrier would thus have to know whether a call was domestic or international to determine what the charge should be. In the past, the IRCs have represented to the Commission that they are unable to determine where a telex call originates. To the extent that this is so, we are uncertain how the IRCs would determine the proper termination charge for each call. Accordingly, if the IRCs wish to implement the bilateral 10 cent termination arrangement in their interconnection tariffs, they should provide a full explanation of how the arrangement would be implemented as part of a request for waiver of the interim discount. We will grant the Chief of the Common Carrier Bureau discretion to determine whether the carrier has demonstrated that the 10 cent arrangement can be implemented in a practical manner and, in such case, to allow appropriate waiver of the terms prescribed in our *Interim* and *Rejection Orders*. If the waiver is granted, the record carrier may then file a transmittal proposing corresponding revisions to its interconnection tariff. The revised tariff should expressly include both the 15 percent discount, without condition, and the offer to terminate domestic traffic at a lower rate, subject to reciprocal arrangement, as service options available to all record carriers. It should also list the carriers interconnecting under the reciprocal offering.

72. One important caveat should be noted. The RCCA allowed the carriers 90 days to reach voluntary interconnection agreements. They failed to do so. This Commission was then required to prescribe interconnection terms to be effective during the three year transition period. Our prescription of interconnection arrangements is the exclusive interconnection mechanism allowed by the RCCA. Carrier arrangements other than those prescribed are not permitted and are of no effect under this plan. Carriers seeking modification of current interconnection requirements must request a modification of our prescriptions in the *Interim Order* and the *Rejection Order*. Thus, carriers may not implement lower, bilaterial charges or other modifications of the prescriptions until and unless the Commission specifically allows it.

6. *Market Share and Reports*

73. The RCCA exempts record carriers which "[do]" not have a significant share of the market for record communications services" from requirements that their domestic and international operations be treated as separate carriers for purposes of interconnection, and that such interconnection be offered to other carriers equal in type and quality and upon the same rates, terms and conditions as to the separated carrier. Section 222(c)(1)(B). In the *Interim Order* we concluded that this exception applied to FTC and noted that there seemed to be no question among the the parties that it also applied to Graphnet. We therefore did not require Graphnet to separate its domestic and international segments, but invited further comments on this determination. 89 FCC 2d at 956.

74. Graphnet provided no information on its market share or the extent of its operations and indeed did not comment at all on this issue. TRT and ITT contend that there is insufficient publicly available information to make a conclusive determination of Graphnet's market share. TRT suggests that on the basis of what is known, such as the number of listed Graphnet subscribers, it would appear that Graphnet has a greater market share than FTC, and perhaps greater than TRT's own. TRT, ITT, and Western Union urge that carriers such as Graphnet, which currently do not file financial, service, and traffic reports under the Commission's Rules, should now be required to do so in order to determined their relevant market shares. WUI also claims that such filings should be made affirmatively to demonstrate that the carrier is eligible for interconnection as a record carrier within the meaning of revised Section 222. In addition, it urges that such carriers should provide this information to establish their *bona fides*, i.e., to provide the public and carriers who may be required to interconnect with information about the financial backing and health of new carriers and their financial, technical, and legal qualifications. It notes that it was forced to write off obligations from another resale carrier which recently went bankrupt. CCI states that it is not required to file reports under its special permission, but will file required reports when it receives permanent operating authority. It also says that it has been reluctant to submit such information voluntarily because it claims the IRCs could use this information for what CCI describes as unrestrained, predatory conduct aimed at driving it out of business. But it states that it is prepared to make such filings if the Commission deems it necessary.

75. As the IRCs point out, the RCCA requires us to differentiate the regulation of record carriers according to their market shares. Applying the RCCA's definition of a record carrier also may require revenue information.[19] To implement these provisions information

[19] Under Section 222(a)(2) the definition of a record carrier "does not include any common carrier which derives a majority of its revenues during any calendar

on a carrier's operations will inevitably be necessary, especially market share data. However, we are not convinced that implementation of the RCCA requires the effective expansion of filing requirements beyond those presently required by our rules and orders. The IRCs suggest that it is possible Graphnet could be considered to have a significant market share; but they don't even raise the possibility that any other carriers would be found to have market shares approaching those of the four major IRCs or Western Union, the carriers apparently designated as having significant market shares by Congress. It is also unlikely that any information we might receive from carriers on the share of their revenues derived from record communications services would be of actual value. The interconnection and other requirements of the RCCA are largely supplements to the Commission's existing authority to regulate carrier interconnection. It is doubtful that the Commission would impose different requirements on certain small carriers who provide record service, but are not technically record carriers in the sense of deriving a majority of their revenues from such services. Thus, the market share data could well be unnecessary as a practical matter.

76. We have also been reluctant to require the filing of Commission reports by new small carriers because of the burdens such reports would impose, the possible adverse effects of such requirements on their ability to compete vigorously, and the fact that there seemed no substantial public need for such information. The RCCA directs us to forbear from unnecessary regulation and promote competition "to the maximum extent feasible." Section 222(b)(1). Imposing additional and largely unnecessary information requirements on small carriers would disserve this clear policy directive.[20] We believe that the few instances in which such information may prove necessary can be dealt with on a case-by-case basis.

77. We also find no merit in WUI's proposal that the filing requirements be extended to additional small carriers in order to demonstrate the carriers' *bona fides*. Our information requirements are imposed for public purposes, to provide the Commission with data necessary to carry out the goals of the Communications Act. We do not collect data to suit the private interest of particular carriers or to enable them to make better business decisions. This is particularly the case where the data might be used for competitive purposes.

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year from the provision of services other than record communications services." The legistative history indicates that this was intended to exclude such companies as AT&T and Comsat. House Report at 10.

[20] None of the petitions suggest that any of the small record carriers are presently required to file reports and are violating our Rules by failing to do so. Our discussion is thus limited to the question of whether we should impose additional filing requirements to implement the RCCA.

78. For these reasons, we deny the request that we impose new filing requirements on all carriers offering record services. However, we do believe that further information is required in the case of Graphnet. Although, we specifically requested comments on the issue of Graphnet's market share in the *Interim Order*, Graphnet itself ignored this request completely. It is likely that a brief filing by Graphnet could have resolved this question. We will therefore direct Graphnet to provide a full record from which the issue can be decided. Graphnet is ordered to file the Commission's Form O Annual Report, as provided in Section 43.21 of the Commission's Rules, and the semi-annual report of overseas telecommunications traffic under Section 43.61, no later than March 31, 1983 and May 15, 1983 respectively. It is also required to make an affirmative declaration of its status as a record carrier under Section 222(a)(2) of the RCCA and, if exemption is claimed under Section 222(c)(1)(B), of its shares in the domestic and international markets. This declaration should be based on identified sources derived from the filed reports or other reports submitted by Graphnet. In general, the filing should contain all the information upon which Graphnet seeks to rely. Other record carriers may not deny interconnection because of the failure of Graphnet or any other carrier to file reports, or of any defects therein, unless the Commission has so ordered.

7. *Contracts*

79. The RCCA provides a comprehensive scheme for regulation of record carrier interconnection, but it also "grandfathers" certain intercarrier contracts. Section 4 of the Act provides that "The amendment made in Section 2 [adopting new Section 222] shall not affect the validity of the terms of any otherwise lawful contract relating to the distribution of outbound international record traffic between any domestic record carrier and any international record carrier if such contract was entered into before June 23, 1981." The House Report indicates that this provision is intended to permit enforcement of contracts by which Western Union agreed to distribute international traffic to certain international carriers such as TRT, if the contracts are "otherwise lawful". House Report at 7, 14. TRT sought to include a contract with Western Union in its interconnection tariff, but this was rejected pending a determination based on an appropriate record[21] that the Commission should reverse or modify its earlier order filed in compliance with the mandate of the Second Circuit Court of Appeals[22] that the contract

[21] Western Union Telegraph Co., 84 FCC 2d 150 (1980).
[22] ITT World Communications v. FCC, 635 F. 2d 45 (2d Cir. 1980).

was unlawful.[23] The Common Carrier Bureau accordingly requested all carriers who had entered into contracts which they claimed were "grandfathered" by Section 4 to file them with the Commission for public comment. The comments were to address the issue of whether each contract is subject to Section 4 and is otherwise lawful within the meaning of that section. This inquiry was limited to the lawfulness of the contract under the Communications Act. The Bureau stated that issues of contract law should properly be decided by a court.[24]

80. TRT and FTC filed contracts in response to this notice. The TRT contract is a letter agreement with Western Union dated May 19, 1980, with a minor modification on July 1, 1980. TRT agrees to provide transiting facilities to Western Union, on a non-exclusive basis, for overseas telex traffic as to which Western Union assumes tariffing, billing, and collection responsibilities. Western Union agrees to route a minimum of 50 million minutes during the first five years of the agreement at a rate of $.30 per minute (or $.10 for traffic to the U.K.) plus the amounts due foreign correspondents. The five year period was scheduled to begin August 15, 1980 (subject to modifications in the July 1, 1980 letter), but all obligations and duties under the agreement would be postponed if the agreement were prohibited or enjoined by this Commission or a court.

81. The FTC agreement, embodied by a letter of November 10, 1980, contains similar terms except that Western Union does not agree to deliver any particular amount of traffic during the five year period. Western Union agrees to transfer to FTC all traffic routed by the sender via FTC and not to discourage such routing by charging rates higher than for traffic routed via any other carrier.

82. Comments were filed by Western Union, RCA and WUI. All of the comments agree that both contracts are of the type encompassed within Section 4 of the RCCA and were entered into before the date specified. Western Union notes that it has previously defended the agreements as lawful under the Communications Act, and does not contest their current lawfulness. RCA and WUI argue that the contracts contravene express provision of the Act and thus are not "otherwise lawful." First, RCA states that the agreements provided different, lower charges for interconnected calls than the formula prescribed in the *Interim Order*, and argues that the contracts therefore violate amended Section 222. But this argument is clearly baseless. Section 4 of the RCCA states that "the amend-

[23] This part of the *Rejection Order* was stayed pending appeal by the court of Appeals for the D.C. Circuit, TRT v. FCC, Docket No. 82–1658, decree entered October 25, 1982.

[24] The House Report states, at 14: "In the event that the agreements are challenged, their legality shall be determined by the courts on well-established issues of contract law, such as the intent of the parties and the nature of the consideration."

ment in Section 2 (of the RCCA) of shall not affect the validity of the terms" of such contracts. It is Section 2 of the RCCA which enacts the amended Section 222, including the requirement that an allocation formula be adopted. Thus, the interim formula implementing amended Section 222 cannot affect the validity of these agreements. Section 4 allows the agreements to differ from any regulatory scheme adopted under the amended Section 222 provided the agreements are "otherwise lawful".

83. Next, WUI argues that the agreements are unjust and unreasonable in violation of Section 201(b) of the Act, and both WUI and RCA assert that they are discriminatory in violation of Section 202(a). Before considering these arguments we should first address TRT's position that Congress intended the "otherwise lawful" provision in Section 4 of the RCCA as a reference only to any remaining questions of contract law, not to whether the agreements might violate other provisions of the Communications Act such as those relied on by WUI and RCA. In support TRT cities language in the House Report that issues of contract law should be decided by the courts.[25] However, the terms of Section 4 "grandfather" the contract only with respect to Section 2 of the RCCA, which repealed and replaced Section 222, not with respect to any other provisions of the Communications Act. If Congress had intended to "grandfather" the contracts against all violations of other provisions of the Communications Act, it presumably would have said so and not limited the exception in Section 4 to amended Section 222.[26] Moreover, in the sentence following the language relied on by TRT, the Report states, p 7; "This legislation should not be construed as affecting the Commission's authority under any of the other sections of the Communications Act of 1934, as amended" Thus, while Congress apparently did not perceive any objection in policy to these agreements, it also has not altered the Commission's traditional responsibility to assure that intercarrier agreements comply with other provisions of the Communications Act.

84. We turn then to the issue of whether the contracts are "otherwise legal" under other provisions of the Communications Act. WUI and RCA argue that the TRT agreement is discriminatory, because Western Union has refused to offer a minimum traffic guarantee to any other carrier; that it is anti-competitive and violative of Commission policy by analogy to prohibitions on exclusive agreements between U.S. international carriers and foreign administrations; that it implements charges and practices which are not just and reasonable under Section 201(b); that it is an illegal market division scheme in *per se* violation of Section 1 of the

[25] See footnote 17 supra.

[26] The House Report also states at p. 7: "The bill does not take a position on the legality of the contract absent the restrictions in Section 222."

Sherman Act; and that it constitutes a denial of reasonable, and non-discriminatory access to an essential facility. First, the discrimination argument is unpersuasive. All of the IRCs have transiting arrangements established by contracts. The fact that a carrier did not make a public offering of its transiting requirements and terms before agreeing to a contract has never to our knowledge been held sufficient to render a transiting agreement unjustly or unreasonably discriminatory. Absent the requirements of amended Section 222 (which of course do not apply to these contracts), the other IRCs would also be free to compete for transiting Western Union or other carriers' traffic.

85. Next, we do not see the relevance to these contracts of our policies preventing foreign administrations from favoring selected U.S. carriers by means of exclusive agreements. These contracts are not exclusive contracts, because either party can make similar arrangements with other carriers, except as presently barred by amended Section 222. There is also not the same likelihood of harm to U.S. national interests as in the case of exclusive agreements with foreign administrations, which can be used to "whipsaw" carriers and eliminate competition. Moreover, the contracts themselves are not anti-competitive on their face. They allow Western Union easier entry into international markets and provide traffic to the small international carriers, who at the same time continue to compete with Western Union and the other IRCs.

86. Nor can we conclude that the transiting charges agreed to would be unjust and unreasonable under Section 201(b). This argument is based on the bald fact that the charges would be different than those under the interim formula. This does not establish the unreasonableness of other, different charges. We might of course seek cost justification of the charges, but it is difficult to see what public benefit would be served by trying to protect one side or the other from what might appear to us an improvident bargain. The IRCs themselves have requested that we allow them to make mutual agreements for domestic interconnection charges which are lower than the interim prescription to facilitate their competition in the domestic market. It is difficult to perceive why we should on the other hand void a voluntary contract to facilitate Western Union's entry into the international market. In the absence of any sign of abuse or harm to the public interest we see no reasons to disturb the bargain reached by the contracting carriers, and certainly no illegality.

87. Finally, we do not find that the agreement violates the Sherman Act.[27] RCA and WUI claim that each agreement is to share

[27] Although the Commission does have the responsibility to enforce the antitrust provisions of Section 11 of the Clayton Act, 15 U.S.C. § 21 (1976), it is doubtful that the Commission has specific authority to enforce the Sherman Act upon common carriers, except insofar as they are also radio licensees. Sections 313, 314

traffic and as such constitute a horizontal market allocation scheme in per se violation of Section 1 of the Sherman Act. They cite *U.S. v. Topco Associates*, 405 U.S. 596 (1972) as authority. However, we do not see how the agreement can be said to have this effect, and the *Topco* case is not in point.[28] Western Union, TRT, and FTC are free to compete for international traffic in all parties of the world, as they presently do in fact. There are no market areas which are reserved for or allocated to one or the other contracting party, as was the case in *Topco*. Both parties are also free to set whatever rates they wish to customers. The agreements only allow Western Union access to facilities in order to compete with other carriers, including those which provide the facilities. The agreements are also non-exclusive. Western Union can transit via other carriers, while TRT and FTC can offer transit service to other carriers (indeed they are required to do so under the RCCA). We perceive no antitrust violation.[29]

88. For these reasons, we conclude that the TRT and FTC agreements are "grandfathered" under Section 4 of the RCCA and otherwise lawful under the Communications Act.

89. One related question remains. Although Western union and TRT differ somewhat on how important inbound, return traffic was as part of the consideration for their agreement, they do both agree that their expectation was that TRT would not hand off inbound traffic to Western Union and would retain any benefits in the form of increased allocations of inbound traffic which might result from the Western Union's outbound transiting traffic. The TRT contract provides "that all outbound overseas telex routing service (or similar) traffic transmitted by TRT pursuant to this Agreement will be considered TRT's traffic for purposes of obtaining allocations of return telex traffic from foreign correspondents." The FTC contract contains an identical provision. The issue of whether the pro rata requirement for inbound traffic should apply to "grandfathered" outbound traffic was not specifically raised in the *NPRM*, but in the *Interim Order* the Commission stated, 89 FCC 2d at 970, "Such contracts for the routing of outbound traffic will be included in the

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of the Communications Act, 47 U.S.C. §§ 313, 314. However, we also recognize that competitive considerations are an important element of the public interest standard which governs our decisions. Northern Natural Gas Co. v. FPC, 399 F. 2d 953, 961 (D.C. Cir. 1968), United States v. FCC, 652 F. 2d 72 (D.C. Cir. 1980).

[28] In *Topco*, a group of supermarkets had allocated among themselves exclusive territorial franchises to market a line of products, in order to minimize competition at the retail level. They also imposed limitations upon reselling at the wholesale level. The Court found these territorial restrictions to be a per se violation of Section 1 of the Sherman Act.

[29] RCA is also incorrect that the agreement prevents reasonable and non-discriminatory access to an essential facility, Western Union's domestic telex network. All international carriers are guaranteed equal access to that network by the RCCA. The TRT and FTC agreements only allow Western Union's international operations access to the international networks of TRT and FTC. Neither of these networks are essential facilities in an antitrust sense.

pro rata calculation. We note that [Section 4 of the RCCA] does not grandfather' contracts for the delivery of inbound record communications service."

90. TRT and FTC seek reconsideration of this language. They argue that the Commission should not and may not nullify or modify these provisions of the grandfathered contract by granting the benefit of return traffic to Western Union under the pro rata provision. Having examined this issue more closely, we will grant TRT and FTC's petitions on this point. The pro rata provision is one of the amendments made in Section 2 of the RCCA. Section 4 of the RCCA provides that amendments in Section 2 "shall not affect the validity of the terms of any otherwise lawful contract relating to the distribution of outbound international record traffic. . ." Although the return traffic provisions in the contracts do not concern outbound traffic itself, they are "terms of contracts relating to the distribution of" such traffic. Under Section 4, therefore, they are not subject to amendments adopted in Section 2 of the RCCA, including the pro rata provision.

8. *Resale carriers and carriers without operating agreements.*

91. ITT urges that the Commission clarify its intent as to the applicability of the outbound transiting arrangements and pro rata return provisions to resale international carriers who lack agreements with foreign administrators.[30] Typically, these carriers operate a U.S.-based operations center where traffic is collected, and use leased private lines to transmit messages overseas, e.g., to London. The messages are then retransmitted via the domestic telex network, e.g., British Telecom. By using computerized storage and high speed forwarding, and possibly by arbitrage of IRC services, service economies, and willingness to accept lower returns, these carriers can offer telex rates lower than the major IRCs. For example, International Relay Inc. (IRI) has a present rate to the U.K. of 40 cents a half minute or 80 cents a minute. ITT's rate is $1.03 a minute. ITT contends that the outbound formula would be unequitable as applied to these carriers. It calculates for example that it would receive less for transiting IRC traffic to the U.K. than it is required to pay to British Telecom. ITT also argues that Congress did not contemplate or intend an extension of the benefits of interconnection to carriers whose method of operations is outside the normal international communications process. ITT proposes that the Commission require such carriers to elect either to continue their present method of operations without benefit of outbound transiting arrangements, or to abandon their present method of operations and route all overseas traffic via a transiting IRC or a foreign administration.

[30] ITT characterizes them as "private network carriers."

92. Consortium Communications International, Inc. (CCI) and IRI oppose ITT's proposal. We need not discuss their opposition in detail, because ITT's position is manifestly in direct conflict with the language and purpose of the RCCA. Section 222(c)(1)(A)(i) states that:

> In implementing its responsibilities under section 201(a), the Commission shall require each record carrier to make available to any other record carrier, upon reasonable request, full interconnection with any facility operated by such record carrier, and used primarily to provide record communications service. Such facility shall be made available, through written agreement, upon terms and conditions which are just, fair, and reasonable, and which are otherwise consistent with the purposes of this section.

Section 222(c)(1)(A)(ii) requires that this agreement implement pro rata sharing of international inbound traffic.

93. This language is unambiguous. It requires full interconnection with any other record carrier during the three year transition period in which it is effective. There is no basis for restricting its operation to carriers who, in ITT's view, engage in "normal international communications arrangements." Indeed, a clear Congressional intent in adopting the RCCA was to allow open entry and free competition and to eliminate so far as possible the competition - inhibiting effects of operating agreements. We affirmed IRI's right to interconnection in the *Rejection Order*.[31]

94. ITT's claim that it must operate at a loss to provide transiting to IRI is also wrong. ITT's calculation is based on IRI's service to London. ITT claims that assuming a 39 cent domestic telex rate, it would receive only 41 cents per minute for transiting, less than the 60 cent payout to British Telecom. This claim is based on use of IRI's rate to determine whether the floor should apply. As we explained above, IRI's rate is irrelevant. In fact, ITT would receive $1.01 per minute under the formula,[32] far more than the 60 cent foreign payout and only two cents less than it receives from its own customers.

95. In sum, CCI, IRI, and all other record carriers are entitled to interconnection at the interim formula rate, and to the benefit of the pro rata provision.

9. *Mandatory use of U.S. IRCs for transiting*

96. RCA proposed in its comments to the *NPRM* that we require the mandatory use of U.S. carriers for transiting. The Commission

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[31] We are not considering here the issue raised by Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services, 77 FCC 2d 831 (1980).

[32] ITT would receive the foreign payout ($.60) plus half the remaining revenue ($1.03-$.60) + .39 ÷ 2 = $.41. Since the total of the domestic rate and transiting carrier ITT's rate is 1.42 ($.39 + $1.03) IRI would retain a total of $.41, and would be required to pay the domestic rate of $.39 for an actual net revenue of $.02. ITT's actual net revenue would be $.41.

rejected this proposal in the *Interim Order* as anticompetitive. 89 FCC 2d at 963, n. 36. RCA repeats this proposal in its petition for reconsideration. It urges that foreign transit services are diverting millions in rate payers' dollars to foreign communications entities which are typically state owned, and contends that proscribing this outflow would cause higher investment in the facilities of U.S. carriers, which, it is claimed, would benefit U.S. users. As RCA states it, this would be a mandatory "Buy America" policy for record communications services. As an alternative, RCA proposes that U.S. carriers be given a right of first refusal to match foreign transit charges. Western Union and Graphnet oppose RCA's request.

97. We continue to find no basis for RCA's proposal. The RCCA makes no provision for such a policy. To the contrary it espouses open entry into the international market and reduced regulation, not additional, restrictive regulations which would deter new entrants in order to benefit U.S. carriers with foreign operating agreements. RCA's proposal would provide a regulatory subsidy to IRCs with operating agreements at the expense of consumers, would impose cartelization upon U.S. transit traffic, and would be likely to initiate protectionist record communication trade wars. It would also represent further regulation in an effort to restrict the access of new and existing U.S. carriers to lower price service options and methods of international operations. Moreover, any such "Buy America" policy would be a significant act of foreign policy with implications for American treaty commitments. Graphnet states that such a regulation would effectively revoke its sole international operating agreement with the Philippines, because under the agreement the Philippines provides transiting services. Graphnet also argues that the proposal is beyond the scope of this proceeding. In fact, the proposal is directly inimical to the purposes of this proceeding and of the RCCA, and it is denied. We also see no purpose in imposing the alternative right of first refusal upon carriers. The Congress directed us to promote competition in the international market, not to impose barriers to its operation by eliminating the right of new carriers to enter into contracts of their choosing. The policy of the RCCA is to replace regulation with competition, yet RCA seeks to have us protect it from competition by additional regulations whose burden would lie on new entrants and whose effect would be to protect established oligopolists. RCA remains free, within the bounds of the RCCA, to compete for transit traffic on the same basis as other carriers.

10. *Classification of Puerto Rico*

98. In the Technical and Technical Related Issues section of the *Rejection Order*, the Commission noted that it was uncertain whether Puerto Rico, which has "commonwealth" status, should be considered a domestic U.S. point under Section 3(g) of the Communi-

cations Act. In view, of this uncertainty, the Commission permitted an agreement by the major carriers to proceed. Without classifying Puerto Rico, the agreement treats it "as if" it were an international point, when the Puerto Rico Communications Authority (PRCA) is not the carrier involved in the calls. In the case of calls originating or terminating on the PRCA, the *Rejection Order* instructed the U.S. carriers to develop technical and rate arrangements appropriate to meet the goals of the RCCA. The Commission reserved the right to determine the ultimate classification of Puerto Rico as "domestic" or "foreign". The PRCA requests reconsideration and a declaration that Puerto Rico is a domestic point for record services. In a recent order, the Commission had occasion to consider this issue directly and determined, as the PRCA contends here, that Puerto Rico is a domestic point under the Communications Act. *Puerto Rico Communications Authority*, FCC 83–28, released February 8, 1983. It also directed carriers to make appropriate corrections in their tariffs.

99. We still do not wish to alter the "as if" technical arrangements for interconnection with the PRCA at this time. To avoid uncertainty, however, we do believe that we should clarify application of the RCCA in one respect, at least until new interconnection arrangements are established. The PRCA is a domestic carrier and its local intra-island telex charge should be used as the domestic component for outbound, international telex calls originating on the PRCA network. The interconnecting IRC would then add its international component charge to yield the total, end-to-end rate. Each carrier would bill its own charges for these calls, as is the current practice. In order to implement this, each IRC must list the PRCA as an other common carrier in its public tariff and reference the PRCA's local tariff to obtain the domestic component.

11. *Settlement for Domestic Termination of Inbound Calls.*

100. Historically, in settlements between the IRCs and Western Union for the domestic handling of inbound international telex calls, the IRCs have paid Western Union its full charge based on actual domestic minutes. ITT claims that its settlements with foreign administrations generally reflect less than the total number of traffic minutes received from each administration because of administrative traffic, accounting charges, and errors. It claims that the IRCs have absorbed a shortfall in settlements in the past, but proposes that settlements should now be based on international settlement minutes. It contends that Western Union will necessarily be bound by accepted international settlement principles in its own international operations, and argues that it would be fair and equitable to require interconnected inbound traffic to be based on these principles. Although the *Interim Order* provides that domestic minutes be used to calculate the domestic segment of international calls (89 FCC 2d at 970), ITT argues that this determination applied

solely to outbound calls. Western Union opposes ITT's request, arguing that ITT has presented no evidence in support of its proposal and that it is merely an attempt to increase IRC revenues which are already far above costs. It contends there is no reason why any domestic carrier should be compensated for less than the actual usage of its domestic network as a result of billing disputes between foreign administrations and the U.S. international carrier.

101. As an initial matter, ITT is incorrect that the treatment of inbound minutes was left unresolved in the *Interim Order*. The Order stated that the carrier providing the domestic segment of any international call may base its cost on domestic minutes. This determination was not limited to outbound traffic. Moreover, the *Interim Order* also determined "that the existing arrangement for handling interconnected international inbound transmission was reasonable and worthy of continuance" 89 FCC 2d at 957. The existing arrangement uses domestic minutes. ITT also presents no evidence or information on the effect of its proposal, such as the number of minutes or amount of revenue involved, the delay necessary to determine international settlement minutes, or other factors. On the face of it, the logical basis for calculating a settlement for use of a domestic network is the actual domestic usage, and we believe that such an approach is at least most consistent - and perhaps actually required - by the dichotomy between domestic and international services mandated by the RCCA. The claim that the IRCs use international settlement minutes for settlement with their own domestic operation provides no persuasive basis for imposing that same regime upon other carriers. Indeed since ITT Worldcom is a single company and all international and domestic revenues go into a single "pot" the contention appears to be meaningless. None of the other carriers supported ITT on this point. In the absence of any evidence or persuasive argument in favor of the use of international settlement minutes, we deny ITT's request for reconsideration on this issue.

12. *Maritime Marine*

102. Maritime Marine Radio, Inc. (MMR) is a carrier providing voice and record maritime services, including telegram and telex, between vessels at sea and points on land both in the United States and abroad. It requests the Commission to extend the scope of the *Interim Order* to apply to record maritime communications carriers and services. Specifically, MMR submits that it is entitled to the benefits of the pro rata return flow provision for traffic originating abroad and routed via a record maritime communications carrier to ships at sea; that the Commission should act concerning outbound, unrouted maritime traffic; that the 15 percent interim discount should apply to traffic originating on a domestic network and interconnected with MMR for completion and to traffic from a vessel

to MMR interconnected with a domestic network for domestic or foreign delivery; and that the 1.3 holding time factor should not apply to maritime traffic, or should apply only to directly connected traffic, not to store and forward telex.

103. Western Union states that its telex and TWX networks interconnect with MMR on a customer paid subscriber-line basis, i.e., Western Union subscribers dial MMR in the same fashion as any other subscriber. It argues that the 15 percent discount applies only to carrier-paid access and in any event that physical limitations in its network preclude giving its subscribers a 15 percent discount on customer-paid calls to MMR. It also contends that if MMR is eligible for carrier-paid access, it should be required to reimburse Western Union fully for the necessary interconnection costs. ITT argues that inbound international traffic routed to a U.S. carrier radio station for delivery to ships at sea is not within the contemplation of the pro rata requirement of the RCCA, and that the Commission itself has limited applicability of this provision to carriers authorized to provide point-to-point international record services, but unable to obtain operating agreements. In response to Western Union, MMR argues that the details of interconnections, including cost reimbursement, are beyond the scope of this reconsideration proceeding. It also states that clarification of the application of the 1.3 factor to maritime traffic should be resolved prior to any request for carrier-paid interconnection. MMR also argues that ITT's position on the pro rata requirement is an overly technical and impractical reading of the statute. It contends the pro rata provision should be read as requiring allocation of international inbound traffic among all interconnecting carriers, including domestic carriers, for subsequent delivery.

104. Specialized record services such as mobile marine service may well require special consideration to give practical effect to the RCCA, and the scant record before us on reconsideration provides no adequate basis for such an undertaking. We limit these comments to the specific issues raised by MMR. First, all record carriers, including marine carriers, are subject to the RCCA. See *Rejection Order*, 91 FCC 2d at 498, n. 38. For example, they are entitled to interconnection with other record carriers. However, it appears that MMR is taking service under customer tariffs. There is no provision for a carrier discount in customer tariffs and no apparent cost difference which would justify such a discount. The prescribed 15 percent discount is available to MMR under the interconnection tariff, but we see no reason to require such a discount in the customer tariff. We express no view on the hypothetical question of how costs for interconnection should be apportioned if MMR chooses to request interconnection as a carrier.

105. Next, MMR is not entitled to any allocation of traffic under the pro rata provision in the circumstances it describes. The pro rata

provision allocates service "between points outside the United States and points of entry in the United States" (Section 222(c)(a)(ii)(I)), i.e., inbound international traffic. MMR does not seek interconnection to provide this traffic. It interconnects with and exchanges traffic with domestic carriers. In the case of messages received by the domestic carrier from overseas, the pro rata provision applies to the international carriers handling the inbound portion, not to the domestic carrier who then receives it or to any subsequent interconnected carriers.[33] Properly, MMR's concern that it may be disadvantaged if domestic carriers favor their associated mobile marine services should be considered under Section 222(c)(1)(B). As we pointed out in the *Rejection Order*, n. 38, mobile marine service is a "foreign service" under 47 USC § 153(g) and thus an international service under the RCCA. See Section 222(a)(i). Domestic carriers offering mobile marine services are therefore required by Section 222(c)(1)(B) to treat their mobile marine operations as separate international operations for purposes of interconnection, and to make interconnection available to MMR and other carriers which is equal in type and quality, and available at the same rates and upon the same terms and conditions as that afforded their own mobile marine operations.[34] MMR's petition does not indicate whether this is the case, or whether it has requested such interconnection. MMR also makes no specific request for action regarding outbound unrouted maritime tarffic, and it is not clear that Commission action is necessary or desirable. Finally, the question of whether to apply the 1.3 holding time factor to store and forward telex traffic is being considered in a separate proceeding decided this day.

13. *Prepublication Review of Other Carriers' Telex Directories*

106. WUI proposed in its comments responding to the *NPRM* that the Commission require each carrier to give all other carriers the right to pre-publication review of telex directories. Western Union opposed the proposal, arguing that WUI had shown no genuine need and that the proposal would involve carriers in each other's business affairs to an extent far beyond anything remotely contemplated by the RCCA. The Commission decided in the *Interim Order* that this tangential issue did not require disposition, 89 FCC 2d at 970. WUI repeats its request, and Western Union repeats its opposition. We have no more information on the competing considerations of fair competition and interconnection as opposed to the

[33] *See* House Report at 10: "The Committee intends that this provision will only affect the distribution of traffic between the point of interconnection with a foreign correspondent and the point of entry into the United States, that is, the purely international segment of these circuits."

[34] We also directed that the domestic and international charges for marine services be unbundled in the *Rejection Order*, n. 38.

avoidance of unnecessary and intrusive regulation than at the time of the *Interim Order* and therefore do not believe that the issue should be decided at this time.

14. *Technical Issues*

107. Several of the petitions for reconsideration of the *Interim Order* raise various technical issues, such as conditions for TWX 110 Baud domestic interconnection, implementation of 3 digit TWX access for international service, and treatment of store-and-forword services. Many of the issues were resolved by agreements among the carriers reached in the course of meetings under the Commission's aegis. The Commission prescribed these agreements as binding upon all affected carriers in the *Rejection Order*. The technical issues raised in the pending petitions for reconsideration are resolved in a separate order issued this day and need not be considered here.

15. *Single Stage - Double Stage Dialing Access*[36]

108. The telex networks of Western Union and the IRCs were of course engineered before enactment of the RCCA. At that time, Western Union generally did not interconnect with other domestic carriers, but did allow its customers to choose among interconnected international carriers. The IRCs carried all calls from their own customers in the authorized gateways but did not interconnect with other IRCs. This difference in functions was reflected in different methods of operation and network design. Western Union's customers were directly connected with the Western Union network and could call other domestic subscribers on the network simply by dialing the subscriber's number. This is referred to as single stage dialing. To make an international call, a Western Union customer would first dial the three digit code for one of the IRCs. Once the customer was connected with the IRC, it would then dial the number of the foreign customer. This is called double stage dialing. The IRCs' customers could not make domestic calls, but were directly connected with the IRC's international network, which used single stage dialing for international calls.

109. In the *Interim Order*, the Commission sought to apply, in a practical fashion the RCCA's requirement that record carriers provide domestic-to-international interconnection to other record carriers on terms equal to those it gives itself. We specifically addressed the issue of parity in dialing stages, and, in view of the differently designed and configured networks, prescribed only generally equal or comparable interconnection. For example, we recog-

[36] Because Western Union and TRT's letters concerning single stage-double stage access raised new issues and were received only shortly before the Commission's review of the petitions for reconsideration, this section was not included in the order approved by the Commission at the March 3, 1983 meeting. The section was adopted by the Commission on circulation for inclusion with this order.

nized that additional digits might be necessary to reach interconnected carriers by means of single stage dialing. For domestic service, we prescribed universal single stage access with a maximum of three additional digits. For international service, we allowed a choice of single or double stage access, so long as generally comparable access was offered to other carriers. If Western Union wished to maintain its double stage access to the IRCs service, it was required to use double stage access to reach its own international services. If the IRCs wished to maintain single stage dialing to their own services, they were required to offer comparable single stage access to Western Union's international services, possibly with additional digits.

110. In reaching this result, the Commission balanced two competing principles. A basic tenet of the RCCA is that equal interconnection with other carriers is essential to full and fair competition. If a carrier gave its domestic customers more desirable single stage access to its own international network, and required less convenient double stage dialing to reach other carriers at the same price, the effect would be to undermine this tenet. The practice would tend to promote cartelization among integrated, end-to-end carriers rather than competition among interconnected carriers. On the other hand, we did not wish to impose unreasonable expenses or degrade service to customers by requiring unnecessary dialing stages to achieve parity. We expected that allowing carriers a choice of access arrangements, so long as comparable access was offered to all other record carriers, would strike a reasonable balance.

111. RCA and WUI seek reconsideration on this issue. Each argues that the IRCs should be permitted to maintain their use of single stage dialing for their own domestic customers, but to offer only double stage dialing for calls via other IRCs, including Western Union's foreign services. They claim in support that the single stage access which can be offered to other carriers (without expensive system modification and service degradation to their own customers) cannot duplicate all the functions or pass all the information possible with double stage access. They have offered to provide Western Union with a basic single stage access lacking features such as departmental billing, but Western Union believed the the lack of such features prevented use of this sort of access in a competitively viable offering. Western Union initially opposed reconsideration of this issue. It had proposed protocols for single stage access which were being considered in technical meetings with the IRCs and argued that the Commission properly applied the RCCA's "equal in type and quality" requirement.

112. In the subsequent technical meetings, the IRCs continued to insist that offering single stage dialing access of a quality comparable to that offered their own customers was prohibitively expensive. The IRCs in fact continued to offer single stage access selectively to

their own international networks after the adoption of the *Interim Order* although none requested a stay or waiver of the *Interim Order's* resolution of this issue. Western Union, on the other hand, has complied with the *Interim Order since it began offering international service in August 1982. It offers double stage dialing access to all international carriers, including its own international operations. No solution to this problem was reached in the technical meetings chaired by Commission staff.*

113. In a February 8, 1983 letter to the Commission, Western Union now advises that it wishes to change its position on this issue. It states that it no longer opposes RCA and WUI's request for reconsideration and endorses the view that each record carrier should be allowed to favor only its own customers with single stage international dialing. Western Union believes that the effectuation of parity in dialing stages is not possible within a reasonable period of time without considerable sacrifice in the quality of service, and it does not favor requiring the IRCs to provide double stage access to their own subscribers unnecessarily. However, Western Union also believes that single stage dialing is a distinctly superior form of access which gives the IRCs a clear competitive advantage in obtaining the outbound international traffic of their own subscribers. To mitigate its present competitive disadvantage, Western Union proposes to permit its subscribers to elect a new procedure which would allow them to route calls in the same manner as the IRCs' customers, i.e, by single stage access to Western Union's foreign service and by double stage access to the IRCs' foreign services. It states that this alternate procedure is intended primarily for customers whose traffic is predominantly international, and it expects only a minor fraction of its customers to elect to use it. Western Union also states that the same kinds of technical difficulties cited by the IRCs preclude it from making this form of single-state access available to the IRCs.

114. TRT has responded to Western Union by letter, dated February 15, 1983. It contends that while it would be unduly burdensome to require the IRCs to establish costly new arrangements for single-stage access because their subscribers are connected to a single switching center, this does not necessarily apply to Western Union's multiple-switch domestic network. It believes the Commission might reasonably conclude that the IRCs need not offer equal connection in these circumstances, but that Western Union may not install new equipment to accord a similar interconnection advantage to its own international services. TRT argues that Western Unions' proposal to establish new arrangements for the purpose of favoring its own international service is clearly opposed to the language and intent of the RCCA and requests that the Commission direct Western Union not to implement the proposed

arrangement at least until the conclusion of a separate proceeding to determine whether the arrangement is lawful under the RCCA.

115. Although the problem of access stage parity is plainly a difficult one, as this background demonstrates, we are not willing to abandon the effort to achieve a solution, as the IRCs and now Western Union urge. All of the carriers apparently agree that single stage dialing is a significantly superior form of access. Western Union, for example, believes that it suffers under a significant competitive disadvantage because the IRCs favor their customers with single stage dialing. TRT believes that discrimination in dialing stages plainly violates the RCCA, though it claims justifiable hardship in its own case. The RCCA's requirement (which is not sunsetted) that record carriers with significant market shares offer interconnection equal in type and quality might as a practical matter be severely eroded or defeated if carriers are permitted to favor their own operations in this way. The effective interconnection intended by Congress might never develop. At the same time our continuing efforts to seek a solution to this problem through negotiated development of uniform or mutually acceptable technical arrangements have not been successful. In the meantime, the IRCs have not complied with the *Interim Order* and have not sought a stay or a waiver.

116. Under these circumstances, we think it may be necessary to consider alternative approaches which will carry out the Congressional intent in a practical manner, at least on a temporary basis. If actual equipment modifications are prohibitively expensive, it may be appropriate to allow carriers to offer a better grade of service to their own customers, as the IRCs request, but to require that a compensating rate differential be applied where the more desirable interconnection is not afforded customers of other carriers. Imposing an appropriate rate differential would compensate for the carrier's failure actually to offer equal interconnection while implementing the intent of the RCCA, and would provide an incentive to develop interconnection arrangements which are equal in fact. We propose for comment a flat rate differential of $.25 per message. We have used a similar approach to adjust for differences in quality of long distance telephone company access to local exchanges. *MTS/WATS Market Structure*, Third Report and Order, FCC 82–579, released February 28, 1983. Alternatively, carriers might be able to develop more nearly equal interconnection on a bilateral basis even if the development of an industry-wide plan presents a more difficult problem. TRT, for example, presented a plan for a kind of compromise arrangement at the last of the technical meetings. We request comments on whether either or both of these possibilities might accomplish the Congressional purpose. We specifically request the views of carriers and other interested persons on an appropriate rate differential to reflect the difference in quality of interconnection

between single and double stage dialing, especially as this is perceived by telex customers. Comments are to be filed within 15 days of the publication of this order in the Federal Register. Reply comments are to be filed within an additional 15 days.

117. While this proceeding is underway, we will waive enforcement of the *Interim Order's* prescription of either full single or full double stage dialing for all interconnected carriers, to the extent of allowing carriers to offer single stage international dialing to their own domestic customers. This interim waiver will apply to Western Union as well as to the other record carriers. We reject TRT's argument that we in effect should single out Western Union for disparate treatment. Fair competition requires that the same rules be applied even-handedly to all record carriers. So long as the IRCs are allowed to deny equal interconnection because of limitations in their systems, we will allow Western Union the same option. To grant the IRCs a competitive advantage so long as they are unable to change would give them a permanent incentive never to acquire the ability to change. It is our intention, and the directive of the RCCA, that the record carriers eventually provide equal interconnection even if this cannot be accomplished immediately.

ORDERING CLAUSES

118. Accordingly, IT IS ORDERED, That the Petitions for reconsideration ARE GRANTED to the extent indicated above, but ARE OTHERWISE DENIED.

119. IT IS FURTHER ORDERED, That all IRCs interconnecting with the Puerto Rico Communications Authority are directed to file tariff revisions implementing paras. 98 and 99 of this order no later than seven days after release of this order, to be effective on seven days' notice.

120. IT IS FURTHER ORDERED, That this order be printed in the Federal Register.

121. IT IS FURTHER ORDERED, That comments are to be filed concerning single stage-double stage dialing access, paras. 108–117 of this order, within 15 days of the publication of this order in the Federal Register. Reply comments are to be filed within an additional 15 days.

122. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96–354) IT IS CERTIFIED, That Sections 603 and 604 of that act do not apply because this prescription will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. § 605(b) (1980 Supp.). The primary economic impact of this order will be upon carriers, not users.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendix may be seen in the FCC Dockets Branch.

Interlocutory Ruling
Review Board, Review Function

Review Board denied petition for extraordinary relief, seeking Board reversal of an Administrative Law Judge's interlocutory ruling that added a financial misrepresentation issue in a comparative broadcast proceeding. Leave to appeal had been denied, and the Board found no flagrant abuse of discretion or other extraordinary circumstances warranting Board intervention.

–Jan-Di Broadcasting, Inc.
BC Docket No. 82–627

FCC 83R–14

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
JAN-DI BROADCASTING, INC. Fruita, Colorado	BC Docket No. 82–627 File No. BPH-810316AP
John G. Gayer d/b/a FRUITA BROADCASTING COMPANY Fruita, Colorado	BC Docket No. 82–628 File No. BPH-810819BB
For Construction Permits for a New FM Station	

MEMORANDUM OPINION AND ORDER

(Adopted: February 25, 1983; Released March 1, 1983.)

BY THE REVIEW BOARD:

1. The Review Board has under consideration a petition for extraordinary relief (and a supplement), a request for stay of the above-captioned comparative broadcast proceeding, and a request for expeditious Board consideration, all filed by Jan-Di Broadcasting, Inc., and responsive pleadings filed by Fruita Broadcasting Company. The petition relates to contested interlocutory rulings made by presiding Administrative Law Judge Joseph Chachkin in this proceeding, but much of the controversy has been mooted by the ALJ's action in Memorandum Opinion and Order, FCC 83M-317, released January 24, 1983, resolving in Jan-Di's favor a financial

issue previously added against it by the ALJ. What remains is a financial misrepresentation issue added against Jan-Di by Memorandum Opinion and Order, FCC 83M-119, released January 11, 1983, the ALJ's denial of Jan-Di's petition for leave to appeal the addition of the issue (FCC 83M-317, *supra*), and Jan-Di's contentions that the issue was added arbitrarily and capriciously by the ALJ and that justice requires that we intervene at this point to abort litigation of the issue.

2. The addition of hearing issues is a matter specifically entrusted to presiding administrative law judges by the Commission's Rules, 47 CFR §1.243(k), and this type of interlocutory action is not appealable as of right, 47 CFR §1.301(b). Where, as here, leave to appeal has been denied by the ALJ, pursuant to 47 CFR §1.301(b), the interlocutory ruling is final unless there has been egregious error or flagrant abuse of discretion and the appealing party has met the burden of establishing that such has occurred. *See Communications Satellite Corp.*, 32 FCC 2d 533 (1971). The burden on the would-be appellant is heavy to ensure orderly procedure and prevent the continual delays that could occur if proceedings were halted every time a party was dissatisfied with an ALJ's interlocutory ruling and sought Commission or Board intervention. *Id.* at 534. We do not believe that Jan-Di has met its burden under *Communications Satellite Corp., supra*, and similar cases, nor has Jan-Di shown any other extraordinary circumstances warranting Board intervention.[1] *Compare Arcatel, Inc.*, FCC 82R-74, 92 FCC 2d 893 (Rev. Bd. 1982) (no Board intervention), *with Hanover Radio, Inc.*, 52 RR 2d 403 (Rev. Bd. 1982) (Board reverses ALJ order refusing to suspend procedural dates). Moreover, we note that there is still pending before the ALJ a further motion for summary decision, in which Jan-Di seeks a ruling resolving the misrepresentation issue in its favor on the merits. Favorable action thereon by the ALJ would completely moot Jan-Di's petition, and, to that extent, Jan-Di's petition is also premature. *Arcatel, Inc., supra.*

3. ACCORDINGLY, IT IS ORDERED, That the petition for extra-ordinary relief filed by Jan-Di Broadcasting, Inc. on January 17, 1983, as supplemented on January 28, 1983, IS DENIED, and the requests for expedition and stay filed by Jan-Di Broadcasting, Inc. on the same date ARE DISMISSED as moot; and

4. IT IS FURTHER ORDERED, That the motion to strike the January 28, 1983 supplement to Jan-Di Broadcasting, Inc.'s petition

[1] Of course, this preliminary observation does not foreclose Jan-Di from renewing the argument as an exception to a subsequent Initial Decision or other final order in this proceeding. See 47 CFR §1.301(b)(1).

for extraordinary relief, filed by Fruita Broadcasting Company on February 1, 1983, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

Grant Without Hearing
License, Assignment of, Voluntary

Applications for voluntary assignment of TV station granted and petitions to deny denied. No substantial and material questions of fact were presented that would warrant a hearing.
–*KSDK, Inc.*

FCC 83–79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of KSDK, INC. (Assignor) and MULTIMEDIA, INC. (Assignee) For the Assignment of License for Station KSDK-TV, Channel 5, St. Louis, Missouri.	File No. BALCT-820219HF
MULTIMEDIA, INC. (Assignor) and KSDK, INC. (Assignee) For the Assignment of Licenses for Station WFBC-TV, Channel 4, Greenville, South Carolina, related translators, and Station WXII(TV), Channel 12, Winston-Salem, North Carolina.	File Nos. BALCT-820219HD; BALTTV-820219HN through BALTTV-820219HZ; BALTTV-820219EZ; and BALCT-820219HE

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 23, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration: (1) the above-captioned applications in which KSDK, Inc., a subsidiary of the Pulitzer Publishing Company (Pulitzer), seeks to assign the license for station KSDK-TV, Channel 5, St. Louis, Missouri, to Multimedia,

Inc. (Multimedia), in exchange for Multimedia's stations WFBC-TV, Channel 4, Greenville, South Carolina, and WXII(TV), Channel 12, Winston-Salem, North Carolina; (2) a timely petition to deny the applications filed by the National Black Media Coalition and others (hereinafter referred to collectively as NBMC);[1] (3) a timely petition to deny the application for the assignment of station KSDK-TV, St. Louis, Missouri, filed by the St. Louis Broadcast Coalition; (4) oppositions to the petitions filed by Pulitzer and Multimedia; (5) replies filed by the petitioners; and (6) various related pleadings.

2. The petitions seek the denial or designation for hearing of the above-referenced applications on issues involving Multimedia's execution of a settlement agreement with the Attorney General of South Carolina; lack of candor by Multimedia in reporting this settlement to the Commission; employment and programming matters; Pulitzer's request for a waiver of the five VHF station limitation of the multiple ownership rules, Section 73.636(a)(2); and a lack of candor by Pulitzer in connection with its waiver request. Additionally, NBMC believes that the lack of candor and employment issues raised in its petition require the institution of revocation hearings, pursuant to Section 312 of the Communications Act, regarding all of the broadcast licenses controlled by Pulitzer and Multimedia. These issues and other matters are considered below.

Procedural Matters

3. Multimedia contends that neither NBMC nor its Chairman, Pluria Marshall, have standing because supporting affidavits do not state that NBMC has members or affiliates in the three communities involved in this transaction. We note, however, that the petition itself identifies the affiants as members of NBMC or its affiliates and that the petition is supported by affidavits from those parties. Additionally, the affidavits establish that at least three of these individuals are residents of the service areas of the stations being exchanged in this transaction. Under these circumstances, we conclude that NBMC and these other petitioners have standing. *See, KSDK, Inc.*, 85 FCC 2d 797 n.1 (1981). Additionally, Pulitzer alleges that NBMC's petition was improperly certified because the pleading is dated April 1, 1982, while the supporting affidavits are dated several days earlier. In response, NBMC indicates that the text of the petition, with the exception of minor editorial changes, was reviewed by these affiants prior to execution of the affidavits. We find this explanation plausible and, in the absence of any evidence to the contrary by Pulitzer, will accept the affidavits.

[1] The other parties to the NBMC petition are as follows: Pluria W. Marshall, Chairman of NBMC; The Cause, an affiliate of NBMC in Greenville, South Carolina; L. R. Byrd, President of The Cause; Dr. Phillip Jeter, a senior member of NBMC; the Greater St. Louis Black Media Coalition, an affiliate of NBMC; and Matthew Knuckles, President of the Greater St. Louis Black Media Coalition.

4. We further note that, although NBMC's pleading is styled as a petition to deny the above-referenced applications, it also requests the Commission to designate for revocation hearings, pursuant to Section 312 of the Communications Act, all of the broadcast licenses controlled by Pulitzer and Multimedia. However, Section 312 of the Act gives the Commission discretion to institute revocation hearings on its own motion but does not specifically create rights in third parties such as NBMC to file petitions to revoke licenses. *Salem Broadcasting Co.*, 1 FCC 2d 655, 657–658 (1965). Rather, such pleadings have been treated as informal requests for Commission action, pursuant to Section 1.41 of the Commission's Rules. *See, e.g., Puerto Rican Media Action and Educational Council, Inc.*, 51 FCC 2d 1178, 1179 (1975); *Radio Para La Raza*, 40 FCC 2d 1102 n.1 (1973); and *LeFlore Broadcasting Co., Inc.*, 36 FCC 2d 101 n.2 (1972). Therefore, we will consider NBMC's pleading as a petition to deny the above-captioned applications and, to the extent that it seeks revocation of the licenses of other stations of Pulitzer and Multimedia not involved in this transaction, we will treat the pleading as an informal request for Commission action under Section 1.41 of the Rules.

5. As a final procedural matter, Pulitzer challenges the standing of the St. Louis Broadcast Coalition. However, the Coalition's petition explains that it consists of various community organizations, representing a cross-section of the viewing audience of station KSDK-TV, St. Louis, Missouri. The petition identifies these groups and is supported by the affidavit of the Coalition's chairperson, who is a resident of the service area of KSDK-TV. Consequently, we find that the Coalition has standing with respect to the application for the assignment of station KSDK-TV, St. Louis, Missouri. *See, e.g., KSDK, Inc., supra.*

Multimedia's Executing and Reporting of a Settlement

6. On August 18, 1980, the Attorney General of South Carolina executed a Release which discharged Multimedia from any claim that may have been asserted by the Attorney General under South Carolina's Unfair Trade Practices Act with respect to contracts between Multimedia and other radio stations constituting the Clemson Football and Basketball Networks. According to the Release, Multimedia has for a number of years originated football and basketball games of Clemson University on its station WFBC-AM, Greenville, South Carolina, and has contracted with various radio stations in South Carolina to carry these broadcasts. The Release states that the Attorney General had determined that a claim should be made against Multimedia and/or various employees asserting violations of the Unfair Trade Practices Act due to contractual arrangements in which stations willing to carry both football and basketball games were favored in the selection of

stations for the networks. The Release points out that Multimedia denied any violation of this law but agreed to settle this claim for $20,000 in order to avoid the costs of litigation that would likely exceed this amount. Finally, the Release concludes that Multimedia has entered into revised agreements with its affiliated stations that have been approved by the Attorney General of South Carolina to assure that there would be no violations of state law.

7. NBMC believes that Multimedia's conduct described in this Release amounts to a coercive tying arrangement under which the stations of its sports network were required to purchase Clemson University basketball games in order to obtain the rights to air the football games. NBMC argues that this arrangement violated Section 1 of the Sherman Act, 15 U.S.C. Section 1, and is similar to the conduct found anticompetitive in *Midcontinent Broadcasting Co. of Wisconsin, Inc.*, 11 R.R. 2d 1081 (1967), where a licensee required national advertisers to purchase time on two Wisconsin televison stations in order to acquire time on either station. NBMC also asserts that this practice undermined licensees' discretion in selecting programming and would have resulted in violations of the Commission's network exclusivity rule, Section 73.132, in that any station desiring to carry Clemson basketball games but not football games, or vice versa, could not do so as long as Multimedia's contracts required other stations to buy the games in combination. As a result, NBMC requests, citing *Abbey J. Butler*, 47 R.R. 2d 852 (1980), that the Commission institute an inquiry of this conduct notwithstanding the settlement.

8. NBMC further states that it has reason to believe that Multimedia was aware sometime in late 1980 or early 1981 that it was being investigated by the Attorney General of South Carolina but did not advise the Commission of the substance of this investigation until it filed renewal applications for stations WFBC-AM-FM-TV, Greenville, South Carolina, on July 31, 1981. NBMC asserts that, by this time, the investigation had been completed in secrecy and the Commission and the public had been effectively precluded from participating in this matter. NBMC believes that this delay in reporting the investigation constitutes a lack of candor similar to that found in *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), and adversely affects Multimedia's qualifications to be a licensee. Therefore, NBMC concludes that the Commission should designate for revocation hearings all of the broadcast licenses controlled by Multimedia.

9. In its opposition, Multimedia asserts that NBMC has misconstrued the contractual arrangements mentioned in the Release as coercive tying agreements. Rather, Multimedia states that stations willing to carry both football and basketball games were favored in selecting stations for the networks, but no stations were forced to carry both football and basketball games. To further support this

position, Multimedia has submitted an affidavit from A. Bruce Buchanan, the General Manager for the past twenty years of station WFBC-AM, Greenville, South Carolina, stating that "if in a particular locality, there was no station willing or able to carry both football and basketball games, WFBC would then contract for football and basketball broadcasts by separate stations, if possible." As a result, Multimedia points out that during the last season in which the preference was accorded (i.e., 1978–1979), 26 out of a total of 54 network stations contracted to carry only football games. In any event, Multimedia states that when these arrangements were questioned, they were revised to the satisfaction of the Attorney General without the institution of any litigation or administrative proceeding; that Multimedia has not admitted any violation of law; and that the Commission has, in the past, held that the act of consenting to a settlement does not imply a wrongful act requiring a hearing.

10. With respect to NBMC's allegation that this matter was not reported in a timely manner, Multimedia contends that it properly advised the Commission of the Release in full compliance with applicable rules. Specifically, Multimedia states that Section 1.65 of the Commission's Rules, which provides that information in pending applications be kept current, does not require the reporting of complaints or preliminary investigations and that no reporting obligation arose until the Release was executed. Multimedia further points out that, at the time the Release was executed, it had no renewal or other applications pending before the Commission that required a litigation report. However, Multimedia states that it submitted copies of this Release with four renewal applications filed on July 31, 1981, which were its first applications requiring a litigation report that were filed after the Release was executed. Multimedia adds that these four applications were granted routinely, as were four other subsequently filed renewal applications that contained the Release. As a result, Multimedia argues, citing *Radio Para La Raza*, 40 FCC 2d 1102 (1973), that these grants represent final Commission determinations that the Release did not adversely affect Multimedia's broadcast qualifications. Therefore, Multimedia concludes that, in the absence of any new evidence submitted by NBMC, these prior Commission findings as to the effect of the Release should not be reopened and that NBMC's request for revocation hearings and for denial of the instant assignment applications should be denied.

11. We are of the view that the timing of Multimedia's reporting of the Release does not present a lack of candor issue requiring a hearing. Rather, we believe that Multimedia has made a good faith effort to comply with the Commission's Rules involving the reporting of investigations and settlements. In this regard, it has been established that a bare complaint or informal investigation by an

agency does not trigger a reporting obligation under Section 1.65 until it "ripens and becomes the subject of a formal proceeding, the outcome of which could reflect adversely on the character of one of applicant's principals." *Payne of Virginia, Inc.*, 66 FCC 2d 633, 643 (1977); *see also*, *Lake Erie Broadcasting Company*, 33 FCC 2d 1009 (Rev. Bd. 1972). In the present case, Multimedia has shown that no such formal proceeding was ever commenced regarding the contractual arrangements described in the Release. The Attorney General of South Carolina never filed a lawsuit, and no administrative agency instituted any proceeding. Consequently, it was reasonable for Multimedia to conclude that no reporting obligation arose under Section 1.65 until the Release was actually executed. However, at that time, Multimedia had no applications pending and was not a party to any Commission proceeding that would require the reporting of the Release pursuant to Section 1.65. Under these circumstances, we believe that it was reasonable for Multimedia to report the Release in its next application that required information on litigation. Furthermore, no evidence has been presented to show an intent by Multimedia to deceive the Commission. Unlike *RKO* and *Payne of Virginia*, *supra*, Multimedia was not involved in a license hearing in which the disclosure of the Release could be prejudicial. Therefore, we find that no lack of candor issue is warranted.

12. Similarly, Multimedia's execution of this settlement does not, by itself, adversely affect its qualifications as a broadcast licensee. We note that the Release was submitted with eight renewal applications with which any interested parties had the opportunity to file pleadings and that these applications were all granted by the staff, pursuant to delegated authority, in November and December 1981, and March, 1982. NBMC has presented no facts to show that these grants were in error. Rather, NBMC is speculating that the contractual arrangements between Multimedia and its affiliated radio stations were coercive tying arrangements. However, Multimedia has maintained through the sworn statement of WFBC's General Manager that no stations were required to purchase both football and basketball games and that the contractual arrangements in question were later revised to the satisfaction of the Attorney General of South Carolina without Multimedia admitting any wrongdoing. Finally, in the absence of any other evidence by NBMC, we do not believe that this settlement can be construed to imply that Multimedia lacks the requisite qualifications to be a licensee. *See*, *Katy Communications, Inc.*, 87 FCC 2d 764, 766 (1981). Therefore, we conclude that Multimedia's executing and reporting of the settlement does not raise any hearing issues.

Employment Matters

13. NBMC next contends that the equal employment opportunity performances of Multimedia and Pulitzer are seriously deficient,

mandating a hearing. In support of this position, NBMC has submitted data from the 1981 Annual Employment Reports (FCC Form 395) for all of the stations controlled by Pulitzer and Multimedia. NBMC believes that these figures show that Pulitzer's hiring of women in the upper-four job categories at all of its stations and the employment of minorities in the upper-four job categories at KSDK-TV, St. Louis, Missouri, is below NBMC's suggested standard for the broadcast industry.[2] NBMC further contends that Pulitzer does not presently contact minority or female organizations for job referrals at KSDK-TV, St. Louis, Missouri, and that it does not propose to retain Multimedia's training program at station WFBC-TV, Greenville, South Carolina. NBMC also alleges that Pulitzer's employment of minorities at stations KTAR(AM) and KBBC(FM), Phoenix, Arizona, is below the Commission's current processing standards.

14. With respect to Multimedia's broadcast stations, NBMC asserts that only five of thirteen reporting units are in compliance with the Commission's processing guidelines for the employment of women or minorities in the upper-four job categories. Additionally, NBMC believes that Multimedia's Annual Employment Reports for Cable Television Systems (Form 395A) show that Blacks and women are underrepresented on the full-time staffs and in the upper-four job categories at most of its CATV systems. As a final matter, NBMC contends that both Pulitzer and Multimedia have proposed little more than the Commission's Model EEO Program; that their current and proposed EEO programs at the three television stations being exchanged in this transaction do not contain certain practices that NBMC believes are important; and that Multimedia does not intend to retain Pulitzer's training program or contributions to local minority organizations at KSDK-TV, St. Louis, Missouri.[3]

15. We are of the view that NBMC's allegations about the equal employment opportunity performance of Pulitzer and Multimedia do not raise a substantial and material question of fact that would require a hearing. Specifically, NBMC's discussion of alleged employment deficiencies at Pulitzer's station KSDK-TV, St. Louis, Missouri, ignores the fact that the Commission, in reviewing the station's

[2] NBMC suggests that minorities and women should be employed on stations' full-time staffs at a ratio of 75% of their availability in the labor force overall and 75% in the upper-four job categories. By comparison, the Commission's revised processing standards provide that renewal applicants with 11 or more full-time employees "will have their EEO programs reviewed if minority groups and/or women are not employed full-time at a ratio of 50 percent of their availability in the labor force overall and 50 percent in the upper-four job categories" (*i.e.*, officials and managers, professionals, salesworkers, and technicians). *See, Public Notice*, FCC 80–61, 46 R.R. 2d 1693 (1980).

[3] The St. Louis Broadcast Coalition joins in NBMC's contention that the adoption of the Model EEO Program by both Pulitzer and Multimedia is not sufficient.

performance during the 1977–79 license term, recently found that the licensee had: "sought vigorously and positively to implement its EEO program . . . and employed women and Blacks in reasonable numbers throughout the past license term." *See, KSDK, Inc.*, 88 FCC 2d at 1445–1446. We have reviewed the station's employment reports for the 1980–83 license term.[4] That review reveals that the employment of women and Blacks at KSDK-TV has continued to be reasonably related to their representation in the available labor force.[5] In addition, the station's current EEO program appears to have been effectively implemented. The KSDK-TV renewal application reveals the station's use of an assortment of recruitment techniques which, during September 1, 1981, to August 31, 1982, resulted in the hiring of 22 persons for full-time positions. Of the 22 persons hired, 15 (68%) females and 4 (18%) minorities were selected to fill various responsible station positions. Similarly, there were six station employees promoted during that period. Five of these employees were female. In addition, a Black woman and a Black male were promoted to the positions of "regular engineer" and director of creative services, respectively. With respect to Pulitzer's other stations, the renewal applications for stations KTAR and KBBC(FM) are due to be filed by June 1, 1983. At that time, the stations' profiles during their license term, as well as their EEO programs, will be reviewed. Similarly, we find no compelling reason to depart at this time from our customary EEO monitoring practices. The EEO performances of Pulitzer's remaining stations will be examined at the time of their next regularly scheduled renewals. Finally, we note that Pulitzer's proposed EEO program for station WFBC-TV, Greenville, South Carolina, clearly indicates that Pulitzer intends to retain Multimedia's training program even though the Commission does not require licensees to have such programs. Multimedia has also indicated its intention to continue a training program at KSDK-TV and to provide assistance to students and

[4] According to the Annual Employment Reports (FCC Form 395) and a renewal application filed on September 29, 1982, the full-time employment percentages for KSDK-TV, St. Louis, Missouri, are as follows:

	Overall		*Upper-Four*	
	Female	*Minority (Black)*	*Female*	*Minority (Black)*
1980 Form 395	25.1%	13.8% (12.6%)	16.2%	9.2% (7.7%)
1981 Form 395	31.0%	14.6% (13.5%)	21.1%	10.5% (9.0%)
1982 Form 395	33.3%	14.4% (12.6%)	23.8%	10.4% (8.2%)
1982 Renewal App.	34.3%	12.8% (11.0%)	25.5%	10.9% (8.8%)

The Missouri Division of Employment Security reported 1982 St. Louis SMSA labor force levels of 42.9% women and 18.7% minority (including 16.9% Black).

[5] NBMC's analysis of the employment profiles at KSDK-TV, as well as at Pulitzer's other stations, is based upon its own suggested standard. To apply such a standard in the present proceeding, however, would be inappropriate.

educational institutions to enhance the qualifications of minorities and women for positions in the broadcast industry.

16. We also believe that no hearing is required as to Multimedia's EEO performance at its broadcast stations. In this regard, we note that NBMC bases its allegations upon the 1981 Annual Employment Reports filed by Multimedia's stations. However, Multimedia subsequently filed renewal applications for 16 of its 18 stations which contained updated EEO programs. Based on this information, the licenses for the two television stations that are being assigned to Pulitzer - stations WXII(TV), Winston-Salem, North Carolina, and WFBC-TV, Greenville, South Carolina - were regularly renewed on November 20, 1981, and on December 9, 1981, respectively. Furthermore, review of the latest employment reports for these stations shows that they are continuing to employ women and minorities in a reasonable relationship to their representation in the available labor force.[6] Additionally, we take notice of the fact that three other Multimedia stations were renewed in November, 1981, and five in March and May, 1982. In view of these recent actions, and in the absence of any additional information by NBMC, we do not believe that further consideration of these stations is necessary.[7] We do recognize that NBMC has pending two petitions to deny the license renewal applications of various stations, including five other Multimedia stations, but since these petitions only deal with the operation of these specific stations, we believe that it is more appropriate to consider such issues in the context of the renewal proceedings.

17. We also find that NBMC has not presented sufficient information to warrant a hearing on Multimedia's EEO performance at fourteen cable television systems. Rather, NBMC is merely relying upon employment figures and has submitted no evidence of

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[6] According to the 1982 Annual Employment Reports, the full-time employment percentages for the two television stations being assigned to Pulitzer - stations WXII(TV), Winston-Salem, North Carolina, and WFBC-TV, Greenville, South Carolina - are as follows:

	Overall		*Upper-Four*	
	Female	*Minority (Black)*	*Female*	*Minority (Black)*
WXII(TV)	39.5%	11.6% (10.4%)	25.0%	8.8% (8.8%)
WFBC-TV	32.0%	15.7% (12.7%)	22.6%	16.7% (13.0%)

The Departments of Labor of North Carolina and South Carolina reported SMSA labor force levels for 1981 as follows:

Winston-Salem, North Carolina - 42.1% women and 16.5% minority (15.9% Black)

Greenville, South Carolina - 40.9% women and 16.0% minority (16.0% Black)

[7] We also note that license renewal applications are currently pending for other Multimedia stations: WBIR-TV, Knoxville, Tennessee; WAKY(AM) and WVEZ(FM), Louisville, Kentucky; and WEZW(FM), Wauwatosa, Wisconsin.

any discrimination at these CATV systems. In any event, Multimedia only controls eleven of these systems, and our review of their EEO records indicates that no substantial and material questions of fact concerning Multimedia's qualifications exist.[8] Accordingly, Multimedia's EEO performance at these CATV systems is no bar to Commission approval of the instant transaction.

18. As a final matter, we note that both Pulitzer and Multimedia have proposed the Commission's Model EEO program for the three stations involved in this transaction; that this clearly complies with the Commission's EEO policies and rules; and that the Commission does not require EEO programs to contain the other practices that NBMC believes are important. *See, e.g., Georgia State Board of Education*, 70 FCC 2d 948, 968 (1979), *recon. denied*, 71 FCC 2d 227 (1979); *Storz Broadcasting Co.*, 88 FCC 2d 641, 644 (1981). Therefore, no issue is warranted regarding the employment practices of Pulitzer or Multimedia.[9]

Programming Matters

19. The St. Louis Broadcast Coalition contends that hearing issues are warranted due to inadequacies in the present and proposed public affairs programming on station KSDK-TV, St. Louis, Missouri. Specifically, the Coalition alleges that the station's local public affairs programs are aired at times with the lowest potential audience (*i.e.*, Sunday mornings), and that the discussion format of two of these programs is the "least expensive and least interesting" way to present public affairs programming. The Coalition also claims

[8] Although Blacks are not represented on the full-time staffs of six of the eleven CATV systems that are controlled by Multimedia and challenged by NBMC, we note that the employment of total minorities is within the zone of reasonableness at five of these eleven systems (*i.e.*, Warr Acres, Nichols Hills, Yukon, and Del City, Oklahoma; and Wichita, Kansas); that one CATV system is located in McPherson, Kansas, where there is an insignificant representation of minorities in the available labor force (*i.e.*, 1.4%); and that the systems located in Herington and Lyons, Kansas, have less than five employees. With respect to the remaining systems, we note that they are located in areas where the total minority and Black representation in the labor force is about 13% and 8%, respectively, and that the size of their full-time staffs is so small (*i.e.*, El Reno and Bixby, Oklahoma - staffs of 5 employees; and Edmond, Oklahoma - staff of 12 employees) that the addition of one minority employee would approximate or exceed parity. *See, Teleprompter of Worcester, Inc.*, 67 FCC 2d 643, 655 (1978).

[9] In its petition, the St. Louis Broadcast Coalition also contends that women and Black men as a combined group are underrepresented on the staff of station KSDK-TV, St. Louis, Missouri, in comparison with their presence in the available labor force. The Coalition believes that this is evidence of an inadequate affirmative action program. However, as explained in the text, above, and documented in footnote four, the employment of women, Blacks, and total minorities at KSDK-TV is well within the zone of reasonableness, and its affirmative action program appears to have been positively and effectively implemented during the current license term. We do not find that this result is altered by the Coalition's combining employment figures from different groups.

that Multimedia proposes a substantial reduction in the amount of total public affairs programming, as well as decreases in the amount of news and other non-entertainment programming. The Coalition believes that these proposals by Multimedia will result in a significant diminution of the present service of KSDK-TV.

20. We are of the view that the Coalition's programming allegations are without merit. In this regard, the Coalition has not shown that the overall programming of the station is not responsive to community needs. Furthermore, it is well established that the amount, scheduling, and format of programming are matters within a licensee's discretion and that the Commission will not substitute its judgment for that of a licensee unless there has been a showing of an abuse of discretion. *See, RadiOhio, Inc.*, 38 FCC 2d 721, 738–739 (1973), *aff'd sub nom. Columbia Broadcasting Coalition* v. *FCC*, 505 F.2d 320, 327–328 (D.C. Cir. 1974); and *Stone* v. *FCC*, 466 F.2d 316, 328 (D.C. Cir. 1972). In the instant case, the Coalition has made no showing that the scheduling or format of KSDK-TV's current public affairs programs constitutes an abuse of the licensee's discretion. Rather, we note that KSDK-TV currently produces two public affairs programs that are aired on Sunday mornings from 9:30 to 10:00 a.m. and 10:00 to 10:30 a.m., respectively. The station also broadcasts other local public affairs programs, including a 30-minute program that is aired one Sunday per month at 9:00 a.m. We find, consistent with past cases, that the the licensee has not abused its broad programming discretion. *See, e.g., District of Columbia Broadcast Renewals*, 77 FCC 2d 899, 908 (1980); and *SRD Broadcasting, Inc.*, 57 FCC 2d 354, 356 (1975).

21. Similarly, the Coalition's allegations concerning Multimedia's proposed news, public affairs, and other non-entertainment programming do not raise a substantial and material question of fact that would require a hearing. Contrary to the Coalition's allegations, the assignee's proposed programming percentages compare favorably with those of the assignor.[10] In any event, an assignee's proposed program percentages need not be identical with those of the previous licensee. *Evening Star Broadcasting Co.*, 42 R.R. 2d 117, 134 (1978), *reaff'd as modified*, 42 R.R. 2d 729 (1978). Rather, the burden is on the petitioner to make a *prima facie* case that the programming proposal cannot reasonably be expected to serve the

[10] On April 23, 1982, the assignor submitted revised program percentages reflecting its current programming in various non-entertainment categories. A comparison of these figures and the assignee's proposed program percentages is as follows:

	Assignor	Assignee
Total Hours/Week	139.5	140
News	9.8%	10.9%
Public Affairs	5.2%	4.5%
Other Non-entertainment	8.7%	9.0%
Local	11.6%	15.8%

public interest. *See, North American Communications Corp.*, 44 R.R. 2d 1208, 1212 (1978); *RadiOhio, Inc., supra*, 38 FCC 2d at 738; and *Evening Star Broadcasting Co., supra*. The Coalition has not met this burden. Accordingly, no issue is warranted.[11]

The Five VHF Rule

22. In connection with its applications to exchange station KSDK-TV, Channel 5, St. Louis, Missouri, for Multimedia's stations WFBC-TV, Channel 4, Greenville, South Carolina, and WXII(TV), Channel 12, Winston-Salem, North Carolina, Pulitzer filed a request for a one-year waiver of Section 73.636(a)(2) of the Rules. That section provides that no party may own, operate, or control more than five VHF television stations. Pulitzer's waiver request was necessitated by the fact that, at the time these applications were filed, Pulitzer controlled five VHF television stations[12] and would control six VHF stations after consummation of the proposed exchange of stations with Multimedia. However, since these applications were filed, Pulitzer submitted an additional application (File No. BALCT-821012FI) to assign station WLNE-TV, Channel 6, New Bedford, Massachusetts, to Freedom WLNE-TV, Inc. This application was uncontested and was granted on December 15, 1982, by the Mass Media Bureau, pursuant to delegated authority.[13] Thereafter, the parties consummated the sale of WLNE-TV on February 2, 1983. As a result, Pulitzer now controls only four VHF stations and, after exchanging VHF station KSDK-TV, St. Louis, Missouri, for two of Multimedia's VHF stations, would end up controlling five VHF stations. Accordingly, the request for waiver is moot, along with NBMC's concerns about the waiver request.[14]

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[11] In a reply pleading, the Coalition also suggests that a fairness doctrine complaint, submitted to the Commission on April 6, 1982, by the YES Committee, affects Pulitzer's qualifications as an assignor. However, we note that the complaint was withdrawn by the YES Committee on June 9, 1982, after a settlement was reached with the licensee. Under this settlement, KSDK-TV agreed to broadcast at no charge the views of the complainant on the need for a nuclear power plant in Central Missouri to rebut the advertising of a local utility company. Under these circumstances, no further inquiry appears warranted.

[12] These stations were: KSDK-TV, Channel 5, St. Louis, Missouri; KOAT-TV, Channel 7, Albuquerque, New Mexico; KETV(TV), Channel 7, Omaha, Nebraska; WGAL-TV, Channel 8, Lancaster, Pennsylvania; and WLNE-TV, Channel 6, New Bedford, Massachusetts.

[13] The staff of the Mass Media Bureau was advised on December 9, 1982, by Pluria Marshall, Chairman of NBMC, that NBMC had no objections to the staff granting the application for the sale of WLNE-TV, New Bedford, Massachusetts.

[14] NBMC also contends that Pulitzer made two misleading statements in its waiver request that raise a lack of candor issue. First, Pulitzer stated that, "to the best of its knowledge, the FCC has never denied a request for a temporary waiver of the five VHF limit." NBMC contends that this statement is misleading because it believes that Pulitzer knew that no such request had ever been presented to the Commission. In response, Pulitzer reaffirms that its statement is correct but "does not know whether such requests . . . might have been presented to the

Miscellaneous Matters

23. In a supplement to its petition, NBMC challenges the late filing of Pulitzer's response to certain questions in the assignment application form dealing with pending litigation. NBMC also contends that the amendment does not describe all relevant lawsuits and that the pendency of several civil antitrust suits should be examined in a hearing. However, we can find no violation of Section 1.65, which requires the updating of material in applications. Rather, Pulitzer stated in its application that an updated litigation report would be submitted later when available from corporate counsel and there is no evidence to indicate that Pulitzer delayed in filing this material. Furthermore, the assignment application form does not require the reporting of all pending litigation, and, in our view, Pulitzer has provided adequate descriptions of the type of suits required by the form. Finally, in the absence of any other evidence by NBMC, the mere pendency of several civil antitrust suits is not a bar to grant of the instant applications because the Commission routinely awaits the outcome of such suits before assessing their effect on a licensee's qualifications. Therefore, Pulitzer's litigation report presents no hearing issues.[15]

Commission and were either not decided or not reported in case decisions." We find that no substantial and material question of fact has been raised that would require a hearing. NBMC has not cited any cases to contradict Pulitzer's position and is merely speculating as to Pulitzer's intent.

NBMC also believes that Harold Grams, a director of Pulitzer, made misleading statements in an affidavit in which Pulitzer's reasons for the sale of station KSDK-TV, St. Louis, Missouri, were explained. Specifically, NBMC refers to a section of the affidavit in which Mr. Grams acknowledges that Pulitzer's newspaper/broadcast combination in St. Louis was grandfathered under the Commission's one-to-a-market rule adopted in 1975 but adds that "since then, there have been additional efforts in Congress and before the FCC to amend the Communications Act or the FCC Rules and Regulations on multiple ownership and to modify the policy on diversification of ownership of media." As a result, he concludes that Pulitzer was uncertain about future regulations and "did not want to be in a position in which it had to divest KSDK in the future under unforeseen circumstances . . ."

NBMC believes that this portion of the affidavit is misleading because it is not aware of any recent efforts at the Commission or in Congress to amend the multiple ownership rules so as to require divestiture of newspaper/broadcast combinations. However, Pulitzer argues that the statements in question represent merely an opinion of the affiant based upon his many years of broadcast experience and that it is irrelevant whether NBMC disagrees with these opinions. We agree with Pulitzer. The statements constitute a business judgment by Pulitzer that it should sell the station, and, although others might disagree with the basis for this judgment, we are unable to infer a lack of candor that would warrant resolution in a hearing. Accordingly, the requested issue is denied.

[15] NBMC also questions whether Pulitzer sufficiently described two ownership matters in its amendment of April 23, 1982. We find, however, that no Section

Tax Certificates

24. Both Pulitzer and Multimedia have requested the issuance of tax certificates, pursuant to Section 1071 of the Internal Revenue Code (26 U.S.C. Sec. 1071), on the basis that aspects of the instant transactions are necessary or appropriate to effectuate compliance with Section 73.636 (a)(1) of the Rules, which limits a party to ownership, operation, or control of one television station, or one daily newspaper, or one AM-FM combination in a market. We find that the tax certificates are warranted because Pulitzer and Multimedia are voluntarily terminating grandfathered cross-ownership of television stations with daily newspapers and/or aural stations. *See, Issuance of Tax Certificates*, 59 FCC 2d 91 (1976). Specifically, grant of these applications will terminate Pulitzer's cross-ownership of station KSDK-TV, St. Louis, Missouri, and *The St. Louis Post Dispatch*, a daily newspaper. Additionally, this transaction will eliminate Multimedia's cross-ownership of station WFBC-TV, Greenville, South Carolina, with stations WFBC-AM-FM, Greenville, South Carolina, and daily newspapers in this market - *The Greenville News* (morning); *The Greenville Piedmont*, (evening); and *The Greenville News-Piedmont* (Saturday and Sunday). Accordingly, the requested tax certificates will be issued.

Conclusion

25. We find that neither NBMC nor the St. Louis Broadcast Coalition have raised any substantial and material questions of fact that would require a hearing on the above-captioned assignment applications. We further find that NBMC has not shown sufficient grounds, pursuant to Section 312 of the Communications Act of 1934, as amended, for the institution of revocation hearings with respect to the broadcast licenses controlled by Pulitzer and Multimedia. Finally, we conclude that the assignors and assignees are qualified to effectuate these transactions and that grant of the above-captioned applications would serve the public interest.

26. Accordingly, IT IS ORDERED, That the petitions to deny filed by the National Black Media Coalition and the St. Louis Broadcast Coalition ARE DENIED.

27. IT IS FURTHER ORDERED, That the applications (BALCT-820219HD through BALCT-820219HF; BALTTV-820219HN through BALTTV-820219HZ; and BALTTV-820219EZ) filed by KSDK, Inc., its parent corporation (The Pulitzer Publishing Company), and Multimedia, Inc., to exchange station KSDK-TV, St. Louis, Missouri, for stations WFBC-TV, Greenville, South Carolina, and WXII(TV), Winston-Salem, North Carolina, ARE GRANTED.

1.65 issue is warranted. Rather, Pulitzer appears to have made a good faith effort to correct and/or update previously reported information concerning voting rights in minority interests of 0.1% and 0.3% of Pulitzer's stock.

28. IT IS FURTHER ORDERED, That a tax certificate will be issued to Pulitzer for the assignment of station KSDK-TV, St. Louis, Missouri, and another tax certificate will be issued to Multimedia for the assignment of station WFBC-TV, Greenville, South Carolina, because these transactions will result in the break-up of grandfathered combinations of television stations and daily newspapers or radio stations in the same markets.

29. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send, by *Certified Mail - Return Receipt Requested*, a copy of this Memorandum Opinion and Order to each of the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Domestic Public Land Mobile Radio Service
Frequency Allocation
One-Way Communications
Paging Service

Memorandum Opinion and Order on Reconsideration (Part 2) adopted which deals exclusively with network, nationwide paging. Commission rejected the unanimous sharing requirement and extended cut-off procedures adopted in the *First Report and Order*, 89 FCC 2d 1337. Commission preempted state authority over technical standards, entry and rate regulations for three network frequencies.
–Mobile Radio Service
GEN. Docket No. 80–183

FCC 83–146

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928–941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service	General Docket No. 80–183 RM-2365 RM-2750 RM-3047 RM-3068

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2)

(Adopted April 7, 1983; Released: May 4, 1983)

I. *Preliminary Statement*

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER FOGARTY ABSENT.

1. We have before us informal comments and four petitions for reconsideration[1] of our *First Report and Order (the Order)* in General

[1] Petitions were filed by Telocator Network of America (Telocator); Mobile Communications Corporation of America (MCCA); Page America Communications, Inc. (Page America); and Beep-Beep Page, Inc. (Beep-Beep Page). Informal comments were filed by American Telephone and Telegraph Company (AT&T) and United Telephone System, Inc. (UTS).

Docket 80–183, allocating three MHz of spectrum from 929 to 932 MHz for private radio and common carrier one-way paging systems.[2]

2. On November 16, 1982, we released a *Memorandum Opinion and Order on Reconsideration (Part 1)*, FCC 82–503, resolving issues pertaining to the local, non-network frequencies and deferring reconsideration of network (regional or nationwide) issues to a subsequent Order. With respect to the non-network frequencies, we affirmed the requirement of need showings for existing carriers requesting an additional paging frequency, and we adopted a fixed forty-mile separation criterion for purposes of determining whether an applicant is entitled to an initial or additional paging frequency without demonstrating need. We also waived the submissions of topographic maps and profile graphs with 900 MHz paging applications.

3. We now address issues which pertain to the network frequencies. All four petitioners request that we change the network policies and procedures adopted in the *First Report and Order*. Page America and UTS also request that we preempt state authority over technical, entry, exit and rate regulations for the three network frequencies. We agree with the petitioners that certain changes are necessary and will better serve the public interest. Therefore, as discussed below, we have decided to alter the regulatory framework for network paging and preempt state authority for the three network frequencies.

II. *BACKGROUND*

A. *Current Network paging policy and procedures*

4. In our *First Report and Order*, we allocated three frequencies for common carriers to use to provide inter-city network paging.[3] An inter-city network paging system would enable a subscriber to receive pages when outside his local service area. If the subscriber travels to an area that is part of an inter-city system, he could be paged through the radio common carrier (RCC) or wireline carrier in that area.

5. Of the three network frequencies, one was restricted to nationwide use and the other two were designated for either nationwide and/or regional paging. Extended cut-off procedures (six months from public notice of the first filing on a channel) were adopted for all three channels, with a single date applicable to the nationwide-channel and different dates applicable for each region on the regional channels.

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[2] 89 FCC 2d 1337.

[3] The three common carrier frequencies allocated for network paging service are 931.8875, 931.9125 and 931.9375 MHz. *See* revised 47 C.F.R. § 22.501(p)(1), in Appendix A of this Order.

6. In addition, because of the limited frequencies devoted to network paging, we decided to require network licensees to share these frequencies instead of licensing only one applicant on a frequency. In an effort to encourage sharing agreements, we determined that applicants must reach unanimous agreement as to the method of interference-free use and technical operation of the frequencies within one year, or all applications would be rejected and those applicants would be barred from reapplying for those frequencies for one year. We also decided to prohibit local paging on the network frequencies. However, if after a three year period the non-network frequencies were exhausted, any nonassigned network frequencies could be applied for and used for local paging.

B. *Pleadings*

7. The petitioners request numerous changes in the regulatory framework for network paging. MCCA and Telocator argue that all three frequencies should be designated for nationwide use, since a nationwide network has the capacity to service both nationwide and regional demand. Telocator and MCCA claim that under our present allocation, the Commission will simultaneously receive both regional and nationwide applications for each frequency. They argue that this will create severe practical and regulatory problems and will only complicate the applicants' task of reaching unanimous agreement as to interference-free sharing of the frequencies. Moreover, MCCA asserts that with the Commission's recent lowband frequency allocations, licensees have already assembled many regional paging systems and do not need frequencies exclusively for that purpose.

8. All four petitioners reject the unanimity concept as unrealistic and unworkable. They argue that it is unrealistic to assume that applicants will voluntarily resolve the complex technical, financial and managerial problems associated with network paging. MCCA, Telocator and Page America emphasize the distinctions between licensing considerations and the technical decisions involving signaling format and network protocol. They argue that it is unreasonable to expect applicants with differing goals and interests to agree unanimously to all aspects of network paging operation. Moreover, the petitioners claim that the unanimity requirement will encourage obstructionists or applicants wishing to obtain unwarranted concessions from those seriously interested in providing network paging to the public.

9. Telocator and MCCA also object to the cut-off procedures adopted in the *First Report and Order*. They argue that the 180 day cut-off period gives applicants who are seriously interested in providing network paging a short period to prepare applications, while "me too" applicants or obstructionists are given twice as long to prepare mutually exclusive applications. Further, MCCA claims that the cut-off procedures will result in smaller cities receiving

network service on a much delayed schedule because time and economics will force applicants to first file applications for network paging authority in major markets. Thus, applicants who fail to file for the smaller cities and towns initially will be precluded from doing so for the entire year that the applicants negotiate organization of the network.

10. Further, MCCA and Page America assert that the cut-off period coupled with a three year reversion for local paging will be the deathknell of network paging. MCCA claims that at least one year-and-a-half will be required to complete one cycle of network paging applications: 180-day cut-off period, followed by one year of negotiation. Since MCCA believes that network paging will be provided first to major markets and will progressively spread to smaller communities, it is concerned that it might take two cycles, or more than three years, for smaller communities to obtain network paging. Therefore, since petitioners believe that allowing local paging on network frequencies would frustrate this service, they are concerned that smaller communities might never obtain nationwide paging.

11. All four petitioners propose alternative regulatory schemes for the network frequencies. Beep-Beep Page, Inc. suggests that we adopt a plurality proposal similar to that implemented in Docket 21039, 77 FCC 2d 212, 215 (1980).[4] Page America suggests a two level approach. It claims that on one level the local licensees of nationwide paging frequencies should agree upon a method of coordinating interference-free sharing of the frequencies, and on a second level agreement should be reached among the managers of the network services.[5] It proposes that we issue construction permits to qualified applicants soon after the cut-off date and condition the permits on the establishment of a frequency sharing plan. With respect to the network managers, Page America suggests that we not require them to cooperate with one another, or file any applications with the Commission since the network plan will be included with the affiliate's applications. It also recommends that the carriers licensed on the nationwide paging frequency be allowed to affiliate with more than one manager.

12. Telocator recommends a "hybrid" form of rulemaking. It suggests that all applicants desiring to operate inter-city networks submit applications pursuant to Section 214 of the Act,[6] containing

[4] Under a plurality plan, if unanimous agreement as to technical coordination is not reached by a certain deadline, the plan supported by the largest group of applicants that reach an agreement would be placed on public notice and opened to comments. Subsequently, the Commission can adopt the plurality plan if it is found to be reasonable and non-discriminatory. All pending applications could then be amended to comply with the accepted form of technical coordination.

[5] Page America's proposal is vague. It does not explain who the "managers" are, or what they should agree to and why.

information including applicant's legal, technical and financial qualifications; its sharing concept; its ability to initially serve 30 metropolitan areas and expand nationwide; and its ability to accomodate both nationwide and regional service on one frequency. The Commission would then issue a public notice listing qualified applicants. The public notice would trigger 30-day periods for comments and reply comments, which would culminate in the Commission's adoption of rules and policies for initiation of inter-city service and licensing of network stations. Telocator states further, that if a negotiated settlement is not reached for operating on the three network channels, the Commission should select the plurality proposal which best serves the public interest, convenience and necessity.

13. MCCA proposes a two-step regulatory process, in which the problem of organizing each channel is solved initially and then the processing of applications for individual stations becomes routine. MCCA suggests that we distinguish between two types of network paging entities, the network organizer and the network operator. The network organizer for each channel would be an RCC or affiliated group of RCC's and would be responsible for defining the signaling format and network protocol for its channel. On the other hand, the network operator would be licensed on one of the three network channels, would interconnect with the existing network and would conform its application to the technical standards established by the network organizer.

14. In the first step, MCCA proposes that the Commission accept applications on a date certain, 90 days after adoption of the Reconsideration Order, only from applicants seeking to organize a network channel. MCCA details the information which should be included in the application. This list is similar to the information requested by Telocator in its proposal; however, it also includes the mode of operation for the network channel, types of service offered, signaling format and network interconnection scheme, and the method by which the applicant would provide open and nondiscriminatory access to the network. MCCA further suggests that if fewer than three network applications are filed, the excess channels could either revert to local use or be held in reserve. If more than three network applications are filed, and if the applicants are unable to align themselves into three groups, MCCA proposes that we conduct written hearings to select the three superior proposals. Further, approximately ninety days after selection of the three network

[6] Although AT&T concurs with Telocator's hybrid rulemaking approach, it states that Section 214 applications are not necessary because the radio license granted under Title III of the Communications Act carries with it Section 214 authority if the lines constructed and operated are the same as those that would be the subject of a Section 214 application. Communications Satellite Corp., 20 FCC 2d 405, 411 (1969); Domestic Fixed Satellite Transponder Sales, 88 FCC 2d 1419, 1424 (1982).

organizers, the Commission should accept applications for the local network paging stations. Each local applicant would be free to select the network with which it wishes to affiliate.

III. *Discussion*

15. We have decided to modify our network paging rules with respect to the channel designations and licensing policies and procedures. When we adopted the network policies in our *First Report and Order*, we were aware of the demand for inter-city paging, but we were unpersuaded by the proposals before us. The petitioners have outlined network proposals which differ significantly from the plan adopted in our *First Report and Order*. Moreover, two groups of experienced carriers have publicly announced proposals to establish nationwide paging systems significantly different from what was contemplated at the time of the *First Report and Order*.[7] Based upon the proposals now before us, we find that certain revisions to the regulatory framework will result in less burdensome procedures, and will lead to the establishment of more economic and efficient network paging systems. We turn first to channel designations and licensing policies, and then to application and authorization procedures.

A. *Channel Designations and Licensing Policies*

16. We agree with Telocator and MCCA that all three frequencies should be designated as nationwide channels.[8] In the *First Report and Order* we designated two of the three channels for nationwide or regional use in the belief that we would thereby "offer users a greater choice of service." We also expressed the view that many potential users might desire service just within a particular

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[7] One group consists of MCI Communications, Metromedia, Communications Industries and American Express. They propose to offer "national electronic message delivery service," primarily over MCI's long distance network and the local distribution facilities of the partners. The other group consists of MCCA and National Public Radio (NPR), which would use excess capacity in NPR's earth stations and satellite transponders for intercity distribution, with local distribution handled by any local paging company that wished to join the network. Our mention of these proposals, in no way indicates our approval of them. No action has or will be taken on these proposals until they are submitted in conjunction with the procedures articulated in this Order.

[8] Local paging was prohibited on the three network frequencies in the *First Report and Order*, at para. 29. None of the petitioners requested that we allow local paging on the network frequencies and we continue to believe that local use of these frequencies, could stifle their development for network use at least in the initial period of development. *But see* para. 25, *infra*. Nevertheless, once the network frequencies are licensed and in operation, economic or operational efficiency may militate in favor of loosening the absolute prohibition against local service. We will entertain requests from the three network licensees to provide local paging as long as it can be offered without displacing or otherwise reducing the quality of service to nationwide customers.

geographic region, such as Washington/Baltimore, rather than between regions or nationwide. However, after reviewing the petitions for reconsideration, we are persuaded that regional service can be provided on the nationwide networks and that separate regional systems on two of the channels will result in less efficient use of the spectrum and will engender difficult licensing and frequency coordination problems.

17. The regional systems we envisioned were modest expansions of the wide-area systems in existence today throughout the Northeast Corridor and other parts of the country. It is quite possible to construct a new regional system by interconnecting transmitters on a single frequency in the newly allocated 35, 43 or 900 MHz channels. In fact, a number of the hundreds of applicants for the lowband and 900 MHz channels have proposed exactly that. Our substantive requirements for network applicants, discussed below, assure that regional paging will be available to augment existing wide area service on local paging channels. Therefore, we find no need to set aside channels specifically for regional paging on the ground that such demand as may exist can readily be satisfied by both wide-area and network systems.

18. A second major change we will adopt is MCCA's proposal to license the three network channels to three common carrier "network organizers" whose services will be distributed through local "network operators" in each community. The "network organizer" will be a common carrier or group of common carriers who will organize the network, *i.e.*, determine among other things, the mode of operation, signaling format, interconnection and interference-free sharing schemes, and who will be licensed by the Commission. The "network operator" will be a local common carrier who agrees to coordinate with the technical parameters of a network organizer, and who will provide network services to its subscribers.

19. We believe, based on the information before us at this time, that this "carrier's carrier" approach is the easiest and most effective way to implement network paging. Unlike the plan adopted in our *First Report and Order* or the proposals submitted by Telocator, Page America and Beep-Beep Page, MCCA's plan no longer relies on interference-free sharing arrangements among potential competitors (whether by unanimity or plurality agreement) as prerequisites to network implementation. This eliminates the complicated and time-consuming cut-off procedures and negotiation periods associated with sharing arrangements. One licensee will be responsible for organizing each network and detailing the legal and financial arrangements and technical parameters of the system. We are hopeful that licensing three separate network organizers - as opposed to requiring sharing among all or a plurality of applicants - will foster technically diverse, competitive networks to the benefit of the public.

20. Under this structure, we tentatively find that the "network operators" should be afforded open and nondiscriminatory access to the network paging systems. In essence, there will be three intercity network systems whose services will be retailed through local outlets. Under our previous plan, the issue of nondiscriminatory access was insignificant because anyone who wanted to participate in nationwide service had an opportunity to share a frequency. Now that we will choose only three network licensees from a potentially large number of mutually exclusive applicants, there appears to be justification for ensuring the right of local operators to feed traffic into the networks and to participate in the distribution of traffic originating outside their service areas to the extent that it is technically feasible. If we do not, the network organizers will theoretically be able to select individual local operators, to exclude all local participants except those already affiliated with the network organizers, or to give their affiliates and subsidiaries favored treatment. We tentatively find that ceding such comprehensive control over local operation to the three organizers would not be in the public interest.

21. On the other hand, affording local carriers open and nondiscriminatory access, provided they agree to abide by the network organizer's technical specifications, will encourage competition at the local level and will increase the diversity of user choices. We also foresee benefits to paging subscribers in smaller cities and towns who will be able to obtain access to a network through a local paging company which might not otherwise have chosen to participate in the network under our previous plan for sharing. In sum, we believe the plan advanced by MCCA, with some modifications, is preferable to any other plan we have considered in terms of expediting service to the public, fostering competition in the provision of network services, and reducing the administrative burdens on the applicants and the Commission.

22. Our network licensing policies are only tentative at this time because we want to solicit further comment on the nondiscriminatory access feature in our companion. Further Notice of Proposed Rulemaking. There may be significant operational or economic reasons, of which we are not now aware, militating against the nondiscriminatory access requirement. It may also be that nondiscriminatory access is not necessary to assure a competitive environment for nationwide paging because substitutable services will be available to consumers. These substitutes could influence the three network licensees to offer and price their services competitively in the absence of nondiscriminatory access, which is, after all, nothing more than unrestricted resale of network service. We do not, however, want to delay the licensing process while we continue to consider the access question. Accordingly, applicants should prepare their applications based on the assumption that the policies stated

here will become final. Should we later decide not to require nondiscriminatory access, we will allow those who have filed timely applications an opportunity to amend. No new applications will be accepted after the cut-off date established here regardless of our disposition of the issues in the Further Notice.

B. *How the System Works*

23. As presently conceived, nationwide paging works fairly simply. The nationwide subscriber has a telephone number assigned to him in his home area by the local carrier (network operator) from whom he takes service. When he travels, he leaves the number with persons who need to reach him, for example, his employer. The employer initiates the page by dialing the local number. The network operator recognizes the number as a nationwide paging number and sends it through terrestrial facilities to the network licensee (network organizer) at the network control center. At that point the signal is routed over the network to terminal points in every city in which the network organizer operates. (The page can also be sent to selected cities, depending upon the configuration of the network). From there, the page is transmitted over terrestrial links to the transmitters of participating network operators and then over the air to the subscriber's paging receiver. Because nationwide and local paging do not share the same frequency, the subscriber initially has to have two pagers for local and network service. However, dual frequency papers are now under development and should soon obviate the need for two pagers.

C. *Application and Authorization Procedures*

24. To effectuate the revised plan for network paging, we will adopt MCCA's two-step process, with some minor modifications. First, we will accept applications from, and license, the common carrier network organizers as set forth below. The organizers will control the use of the frequencies and will have all the rights and responsibilities under the Act and the Commission's Rules associated with such control. Second, we will accept abbreviated applications from, and authorize, the local paging companies who have chosen to participate in a network. These companies will have no right to use the frequency other than in the manner specified by the organizer. As explained below, the application form for local operators will be abbreviated, and only a minimum amount of technical information will be required.[9]

25. Those seeking to organize a network must submit their applications no later than 90 days after publication of this Order in the Federal Register. At the close of the 90 day period, we will review the applications to determine their acceptability for filing, and we

[9] *See* para. 25, *infra*.

will then issue a Public Notice announcing any mutually exclusive applications and beginning the thirty day pleading period.[10] If fewer than three applications are received, we will hold the remaining channels in reserve to revert to local use if they are not used for network paging within three years as provided in the *First Report and Order*. If more than three applications are received, as expected, and if the applicants do not align themselves into three groups under the procedures in Section 22.29 of the Rules, the three licensees will be selected by whatever comparative selection process is in effect at the time.[11]

26. Because only three network licenses are available, we agree with MCCA that the network organizers ought to submit something more than bare-bones applications on Form 401.[12] These networks are likely to be complex and expensive to organize and construct, so it is important for us to examine financial and technical ability in evaluating the applications. Furthermore, to insure that the networks are truly nationwide in scope, we find that there should be a minimum number of communities served from the initiation of service. Telocator suggested 30 cities, but we believe that may be too many considering this is a new service with which no one has any experience. We find instead that it is reasonable to require each applicant initially to propose to serve at least fifteen metropolitan areas of its choice, and to submit its plans demonstrating how it will expand service nationwide[13] within two years of the start of service. We will define "metropolitan areas" as the Standard Metropolitan Statistical Areas (SMSAs) listed in the U.S. Department of Commerce's Statistical Abstract of the United States - 1981 (102 Ed.) at pp. 920–925. We do not anticipate updating this SMSA list or accepting markets from any other source.[14] The following is a summary of the information that must be filed as part of the application:

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[10] Applicants should *not* designate a specific channel in their applications. All applications filed for the three network channels will be deemed mutually exclusive because we consider the channels to be fungible. *Contrast* Digital Electronic Message Service, 88 FCC 2d 1716 (1982).

[11] We do not rule out random selection at this time; however, we anticipate receiving disparate proposals, which may militate in favor of traditional or modified comparative procedures.

[12] It is not necessary for applicants to demonstrate need for network service because we found such need when we allocated three channels in our *First Report and Order*.

[13] By "nationwide" we do not mean literally everywhere in the country. We leave it to the applicants to forecast demand for service; however, we anticipate that the scope of the network service proposed by each applicant could be a comparative criterion in awarding licenses.

[14] There are no minimum coverage areas or any similar requirements as there are in the cellular radio rules, 47 C.F.R. § 22.901 *et seq*. Applicants need only propose at least one nationwide transmit/receive point within their chosen SMSAs.

(a) the applicant's projected costs of organizing and constructing the network and its technical and financial ability to start up and operate the network;

(b) the proposed mode of operation and technical plan for implementing the network channel, including but not limited to the types of services offered, signaling format and network interconnection plan;[15]

(c) the method and extent to which the proposed network would provide for interference-free operation on the channel in each local area;

(d) the method by which the applicant would provide open and nondiscriminatory access to its network;

(e) the initial service proposal for at least fifteen Standard Metropolitan Statistical Areas;

(f) the applicant's plans for expanding network service from its initial markets to nationwide coverage within two years from the initiation of service;

(g) a model tariff showing, among other things, how it intends to provide nondiscriminatory access to network operators;[16] and

(h) how the public interest, convenience and necessity would be served by a grant of the particular application.

27. The second stage of processing will be the licensing of the local operators on the network organizer's frequencies. Immediately after selection of the network organizers, we will begin taking applications from the local participants, the network operators.[17] We contemplate issuing a Public Notice formally establishing the opening application date; there will be no cut-off date because there is no mutual exclusivity. This licensing requirement is only necessary to insure compliance with our technical rules for transmitters and antenna structures. Accordingly, from carriers who already hold FCC licenses for paging or two-way mobile service, we will require only that pages 1 through 3 and the signature on page 6 of the Form 401 be submitted. These applicants may also omit answers to items 12, 13, 14, 15, 24, 25, 27, and 28, unless answers are needed to correct out-of-date information on file with the Commission. However, new entrants must complete the entire form to enable us to assess all of their qualifications to be Commission licensees. One additional

[15] As part of the proposal, each applicant is expected to describe how it will achieve efficient use of its channel.

[16] Our approach to rate regulation is still under consideration. *See* paras. 29 and 36, *infra*. Consequently, applicants may not be able to formulate comprehensive tariff proposals by the filing deadline. We will accept model tariffs after the filing deadline as amendments to applications if we have not decided upon the method of rate regulations before then.

[17] Since our ultimate decision on access requirements will affect the licensing of local operators, we will not accept stage two applications until that question is resolved. However, if we retain the open access requirement, the network operator would be free to affiliate with any or all of the network organizers licensed, as long as it agrees to adhere to the specifics of each carrier's network paging proposal. Furthermore, there would be no requirements as to the number of markets an individual operator may serve.

requirement for all applicants will be a statement on the Form 401, asserting their willingness to comply with the network organizer's technical specifications. We anticipate that this type of *pro forma* licensing will speed service to the public with a minimum of paperwork for the Commission and the applicants.[18]

D. *Federal Preemption*

28. In our *First Report and Order*, we decided not to preempt state authority for the 900 MHz frequencies. We concluded that since paging systems are basically local in nature, the states should not be preempted from decisions concerning entry, technical and rate regulations for paging common carriers.

29. In their petitions, Page America and UTS urge the Commission to preempt state authority with respect to entry, technical, and rate regulation for the three network frequencies.[19] Page America argues that by prohibiting local service on these frequencies we have created a new interstate communications service, and the states should be prohibited from regulating the operations on these three frequencies. It claims that without federal preemption, the development of an effective and feasible nationwide paging service will be delayed and its growth may be prevented. We believe Page America and UTS have raised valid concerns.

30. Federal preemption may occur in two instances. First, Congress may either expressly order preemption in a statute or implicitly command preemption by the statute's structure and purpose. Second, valid federal regulation may preempt state law or regulation whenever the state action creates an obstacle to the implementation of the purpose of the federal regulation. *Fidelity Federal Saving and Loan Association v. de la Cuesta*, ___ U.S. ___, 73 L.ED. 2d 664, 675 (1982). *See also*, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The second situation exists in this proceeding. We have created a new nationwide communications service pursuant to our statutory authority. Because state regulation over the technical standards, entry, and rate regulation could seriously impede the development of this service, we believe such state regulation must give way to the paramount federal interest.

31. This new nationwide paging service is being authorized pursuant to both Title III and Title II of the Communications Act of

[18] These applications will be granted without a formal comparative hearing pursuant to Section 22.32(b) because the applications are not mutually exclusive, nor subject to comparative consideration. The accepted applications will be listed in an informative public notice and will be subject to petitions to deny under Section 22.30 of the rules.

[19] The method and extent of our rate regulation is discussed in an accompanying Further Notice of Proposed Rulemaking. This Notice requests comments on various tariff procedures for both the network organizers and operators.

1934, as amended. Under Title III of the Act, the Commission has broad authority to regulate all communications by radio. That authority includes the power to "classify radio stations," to "prescribe the nature of the service to be provided by each class of licensed stations," to "study new uses for radio," and to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. §§ 303(a), (b), and (g). Furthermore, Section 301 of the Act explicitly grants this Commission sole authority to license radio facilities.[20] Under Title II of the Act, the Commission has broad authority to regulate interstate common carriers, whether or not they use radio facilities. Pursuant to Title II, the Commission regulates (1) entry into and exit from interstate service, (2) rates and regulations governing the offering of interstate service, and (3) interconnection between carriers for the provision of joint or "through" interstate service. 47 U.S.C. §§ 201–105, 214. The courts have recognized a broad discretion in the Commission with respect to the manner in which it exercises its Title II powers to achieve statutory objectives.[21] Of course, the Commission's Title II authority over interstate common carriers does not extend so far as to extinguish legitimate state regulation of purely intrastate common carrier communications. 47 U.S.C. § 152(b).[22] The Commission's authority over interstate common carriage, however, is comprehensive and does extend to facilities and services that might be located wholly within a single state if those facilities and services are essential or integral parts of interstate communications.[23]

32. In accordance with this statutory authority, we are certain the subject nationwide paging service. Because paging services have historically been local in nature, the states have traditionally regulated paging common carriers. Network paging, however, will be

[20] In particular, Section 301 provides that "no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license on that behalf granted under the provisions of the Act." 47 U.S.C. § 301.

[21] *E.g.*, AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966); *Cf.* Computer & Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed* (U.S. February 9 and 10, 1983) (Nos. 82–1331 and 82–1352); Telocator Network of America v. FCC, 691 F.2d 525 (D.C. Cir. 1982). Additionally, Section 221(b) reserves to the states jurisdiction over local telephone exchanges which serve single multi-state areas. North Carolina Utilities Commission v. FCC, *supra* at 1045.

[22] *See* National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II) (Opinion of Wilkey, J.).

[23] Computer & Communications Industry Association v. FCC, *supra*; People of California v. FCC, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); Puerto Rico Telephone Co. v. FCC, 553 F.2d 694 (1st Cir. 1977); North Carolina Utility Commission v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (NCUC II). *See also* New York Telephone Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980); General Telephone Co. of the Southwest v. FCC, 449 F.2d 846 (5th Cir. 1971).

predominantly an interstate service, which may also address intrastate demands. In an effort to assure nationwide service, we have imposed two significant requirements upon any entity proposing to offer nationwide service. First, we have initially prohibited local paging on these frequencies. Although network organizers will be permitted to request permission to offer local paging on a secondary basis, such service offerings will not be the ordinary situation and will not be permitted to displace nationwide service. Second, and possibly more important, we are requiring that the three network licensees demonstrate the capability both to serve 15 SMSAs initially and to expand paging service nationwide within two years. Furthermore, in an effort to increase competition in this new market, we are tentatively requiring that the network operators be afforded open and nondiscriminate access to any or all nationwide channels. Regardless of whether that requirement is retained, it is essential to the interstate development of nationwide paging that the network organizer and its operators be afforded access to all cities and states it desires to serve. To achieve the rapid implementation of nationwide service and these policy objectives, we believe our regulation of the service must preempt state regulation with respect to entry, technical standards, and rate regulation for the three network frequencies.[24]

33. Preemption of state entry regulation is necessary for several reasons. Initially, as note above, access for paging operators to every city and state is crucial to our network scheme. If the states restrict entry, implementation of this service will be frustrated. Depending upon how the network is organized, full nationwide coverage might be thwarted if carriers in particular cities are denied entry. State entry regulation also could delay the implementation of this new service as well as increase the carrier's expense of providing it. We realize that because this service has some intrastate characteristics the states may have an interest in how it is provided. The states, like other interested parties, may raise their concerns with this Commission whenever these entities apply for licenses.

34. We are also asserting federal primacy over technical standards for the network paging service. Nationwide operators will be required to comply with the technical parameters specified by the network organizer, including but not limited to the mode of operation, signaling format, network interconnection and method of interference free sharing. The assurance of compatible operation of equipment on an interstate and nationwide basis for the three frequencies is essential to the success of this service. State licensing requirements could add additional and possibly conflicting network technical specifications that would defeat the nationwide plan.

35. Finally, our action cannot coexist with state rate regulation

[24] *See* n. 18 *supra*.

of the three network organizers. The nationwide systems can be used for both interstate and intrastate communication.[25] Although the states generally regulate intrastate communications, they must stand aside when, as here, it is technically and practicably impossible to separate the two types of communications for tariff purposes.[26] Furthermore, we have issued an accompanying Further Notice of Proposed Rulemaking which solicits comments on the extent and method of rate regulation for the network operators. The scope of any preemption vis-a-vis the network operators' rates will be resolved in that proceeding.

36. We note that our preemption of state regulation in this instance is consistent with precedent. The preemptive effect of valid Commission actions over state regulation when it could interfere with interstate communications has consistently been recognized by the Courts. *Orth-Vision*, 69 FCC 2d 657 (1978), *aff'd sub nom. New York State Commission on Cable Television v. FCC & USA*, 669 F. 2d 58 (2d Cir. 1982); *Telerent Leasing Corp.*, 45 FCC 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir.) *cert. denied*, 429 U.S. 1027 (1976). Further it is will established that the Commission may assert jurisdiction over facilities that are wholly within a single state if local services cannot be easily and practicably separated from interstate services supplied through the same facilities. *People of State of California v. FCC*, 567 F. 2d 84 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1010 (1978); *North Carolina Utilities Commission v. FCC*, 552 F. 2d 1036 (4th Cir.) *cert. denied*, 434 U.S. 874 (1977).

37. In conclusion, we find that federal preemption in this case is necessary if our policies are to succeed. State regulation could impede the development and provision of this new, innovative, and primarily interstate telecommunications service.

E. *Other Matters*

38. In the *Memorandum Opinion and Order on Reconsideration (Part 1)*, we waived the submissions of Section 22.15(j)(8) topographic maps and Section 22.115 profile graphs, and we added the requirement tht maps on a scale of 1:250,000 be submitted. For the sake of clarity, we have rewritten the applicable rules to reflect these changes. *See* Appendix A.

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[25] For example, a nationwide system can be used to communicate intrastate from San Francisco to Los Angeles, as readily as it can be used interstate from San Francisco to New York.

[26] *See* Computer & Communications Industry Association v. FCC, supra at 215; North Carolina Utility Commission v FCC, 537 F. 2d 787 (4th Cir.), *cert denied*, 429 U.S. 1027 (1976); North Carolina Utility Commission v. FCC, 552 F. 2d (4th Cir.), *cert denied*, 434 U.S. 874 (1977).

IV. *Conclusion*

39. This is the first time that common carrier frequencies have been devoted exclusively to nationwide inter-city paging systems. We decided to reject the burdensome and time-consuming extended cut-off procedures and unanimity sharing agreements adopted in the *First Report and Order*. We also reject the complex licensing and coordination problems associated with authorizing separate regional and nationwide networks. One network organizer will be licensed on each frequency. This licensee will have thoroughly devised a method for technical interconnection and interference-free coordination among carriers. Then any local common carrier who wishes to provide network services will be authorized to affiliate with one or more network organizers by adhering to the licensee's proposal. We believe that this two-step regulatory process is workable and will promote the Commission's goals of competition and diversification. We are confident that it will implement nationwide paging in the most efficient and expeditious manner possible.

V. *Ordering Clauses*

40. Accordingly, IT IS ORDERED, that the petitions for reconsideration are granted to the extent set forth herin, and are otherwise denied.

41. IT IS FURTHER ORDERED, That pursuant to the authority found in Section 154(i), 301 and 303(r) of the Communications Act of 1934, as amended, Part 22 of the Commission's Rules and Regulations ARE AMENDED as specified in Appendix A. These amendments shall become EFFECTIVE 30 days after publication of this Memorandum Opinion and Order in the Federal Register.

42. IT IS FURTHER ORDERED, That applications by the applicants desiring to organize a network frequency will be accepted 90 days after this Order is published in the Federal Register.

FEDERAL COMMUNICATION COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

47 CFR Part 22 is revised as follows:

1. 47 C.F.R. § 22.501(p)(1) and (2) is revised to read as follows:

(p)(1) For assignment to base stations of communication common carriers for use exclusively in providing a one-way signaling service. (center frequency of 25 khz band)

931.0125 MHz	931.3625 MHz	931.7125 MHz
931.0375 MHz	931.3875 MHz	931.7375 MHz
931.0625 MHz	931.4125 MHz	931.7625 MHz
931.0875 MHz	931.4375 MHz	931.7875 MHz

931.1125 MHz	931.4625 MHz	931.8125 MHz
931.1375 MHz	931.4875 MHz	931.8375 MHz
931.1625 MHz	931.5125 MHz	931.8625 MHz
931.1875 MHz	931.5375 MHz	931.8875 MHz[1]
931.2125 MHz	931.5625 MHz	931.9125 MHz[1]
931.2375 MHz	931.5875 MHz	931.9375 MHz[1]
931.2625 MHz	931.6125 MHz	931.9625 MHz
931.2875 MHz	931.6375 MHz	931.9875 MHz
931.3125 MHz	931.6625 MHz	
931.3375 MHz	931.6875 MHz	

[1] Reserved for stations engaged in providing nationwide network paging service; as provided for in § 22.527.

(p)(2) Specification of frequency in application. (a) *Non-network*: An applicant for a new, non-network frequency in the band 929–932 MHz will not specify a frequency in its application. It may specify its non-network frequency preference, but the Commission is not bound by such requests. (b) *Network*: An applicant wishing to organize a network frequency will not specify a frequency preference in its application but must make the showings required by § 22.527. The subsequent applications filed by the affiliating, local common carriers should specify the specific network channel it desires.

2. Part 22 is amended by adding new Section 22.527 to read as follows:

§ 22.527 Channel assignment policies for 900 MHz one-way signaling channels reserved for stations engaged in providing network signaling service.

(a) An applicant wishing to organize a network signaling channel should not specify a particular channel in its application.

(b) The applicant shall submit to the Commission copies of agreements, if any, and system diagrams and plans illustrating how applicant proposes to utilize the desired network signaling channel. Applications filed pursuant to this paragraph must contain at a minimum the following:

(i) Technical standards describing the types of one-way communications to be provided, the signaling format under which individual receivers may be selectively signaled, and the network protocol under which all stations licensed or subsequently licensed on the desired network signaling channel may be connected or interconnected for the purposes of exchanging or delivering signaling messages for transmission by such stations.

(ii) Description of how the proposed system and the technical standards described in paragraph (i) will not discriminate as to access, cost, or otherwise between applicant and the local operators for the desired network paging channel.

(iii) Description of how the proposed network would provide for interference-free operation on the channel in each local area.

(iv) Description of applicant's technical and financial qualifications to construct the proposed system and to develop and implement the technical standards

described in paragraph (i). Such financial qualifications shall satisfy the requirements of § 22.917.

(v) Description of how applicant with others, will provide network signaling service to at least fifteen Standard Metropolitan Statistical Areas initially and to how it will expand network services nationwide within two years.

(vi) a model tariff showing, among other things, how it intends to provide nondiscriminatory access to network operators; and

(vii) Description of how the public interest, convenience and necessity will be served by a grant of the application.

3. 47 C.F.R. § 22.15(j)(8) is revised to read as follows:

(8) Topographic maps (see also Section 22.116) showing the information set forth in Sections (i) and (ii) below are required in all part 22 services except for 900 MHz one-way paging applications, which are governed by Section (iii) below.

(i) exact station location

(ii) location of radials used in determining elevation of average terrain.

(iii) Exact station location should be plotted on a map with a scale of 1:250,000 and the reliable service area should be depicted by a 20 mile radius for each base station.

4. Part 22 is amended by adding new Section 22.15(j)(10) to read as follows:

(j)(10) For 900 MHz one-way applications, the profile graphs referred to in Section 22.116 are not required.

Settlement

Where applicants submitted affidavits showing compliance with Section 311(c)(3)(a) and (b) of the Communications Act verifying that the applications were filed in good faith and in order to obtain a grant, the agreement would be approved.
–Oak Television of Everett, Inc.
BC Docket No. 81–456

FCC 83R–25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OAK TELEVISION OF EVERETT, INC. Everett, Washington	BC Docket No. 81–456 File No. BPCT-800409KF
UNITY BROADCASTING COMPANY OF WASHINGTON STATE, INC., Everett, Washington	BC Docket No. 81–457 File No. BPCT-800908KG
GREATER EVERETT TELECASTERS Everett, Washington	BC Docket No. 81–458 File No. BPCT-800908KH
CHANNEL 16, INC. Everett, Washington	BC Docket No. 81–459 File No. BPCT-800908KF
For Construction Permit for a New Television Station	

MEMORANDUM OPINION AND ORDER

(Adopted: April 5, 1983; Released: April 7, 1983.)

BY THE REVIEW BOARD: BOARD MEMBER JACOBS ABSENT.

1. The four applicants in this case on February 10, 1983 filed a joint petition for approval of agreement which was supplemented March 29, 1983. We will grant the petition as supplemented because the applicants have complied with the new settlement requirements of Section 311(c)(3) of the Communications Act, 96 Stat. 1087. *See Texas Television, Inc.*, 52 RR 2d 1268 (Rev. Bd. 1982), *review denied*, FCC 83–95, released March 9, 1983.

2. Section 311(c)(3) as amended now provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience, or necessity; and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

In the Initial Decision released November 8, 1982, FCC 82D-72, the Administrative Law Judge concluded that a grant of Unity Broadcasting Company of Washington State, Inc. would serve the public interest. Instead of filing exceptions the four applicants entered into an agreement which on approval would result in the immediate grant of the Unity Broadcasting Company application. They point out that the agreement is in the public interest because it will bring to an end protracted and lengthy proceedings reducing the burden not only on the parties but the Commission as well. They state that the agreement also "presents an unprecedented opportunity for the Commission to realize expeditiously the benefits growing from and achievements inherent in its clearly enunciated minority ownership policy, namely, minority ownership of a UHF television facility in a top fifteen television market. *See Policy Statement on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 (1978)." The Commission and Congress have recognized that settlement agreements such as the one in this case shorten lengthy and expensive proceedings, expedite initiation of new service, and generally serve the public interest. *See Texas Television, Inc., supra. See also Bison City Television 49 Limited Partnership*, FCC 83R-17, released March 16, 1983 (Rev. Bd.).

3. Section 311(c)(3)(b) requires a showing that "no party to the agreement filed its application for the purpose of reaching such agreement." The supplement filed on March 29, 1983 contained affidavits and certification from all applicants verifying that their applications were filed in good faith and to obtain a grant. The record also reveals the applications have been vigorously prosecuted throughout the comparative hearing. Thus, there is no indication that the applications were filed for the purpose of reaching or carrying out the settlement agreement. Since the parties have shown compliance with both Section 311(c)(3)(a) and (b), their joint request is hereby granted.

4. This is the second recent case in which the Board was obliged to withhold action on a settlement agreement which was clearly in the public interest until the pleadings could be supplemented to show compliance with Section 311(c)(3)(b). *Cedar Creek Radio Co.*, FCC 83R-21, released March 17, 1983. In the future such delays can be avoided if the applicants submit the following information:

a. A summary of the history of the negotiations including who initiated the negotiations. 47 CFR 73.3525(a)(2)(3).

b. The reasons why the agreement is in the public interest. Section 311(c)(3)(a), above.

c. A statement demonstrating the applications were not filed for the purpose of entering into the agreement. Section 311(c)(3)(b), above.

5. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, filed February 23, 1983, by Oak Television of Everett, Inc. IS GRANTED, and the amendment IS ACCEPTED; and that the joint petition for approval of agreement filed February 10, and supplemented March 29, 1983 IS GRANTED; that the application of Unity Broadcasting Company of Washington State, Inc. IS GRANTED; that the applications of Oak Television of Everett, Inc., Greater Everett Telecasters and Channel 16, Inc. ARE DISMISSED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO *Chairman, Review Board*

FCC 82D-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OAK TELEVISION OF EVERETT, INC. Everett, Washington	BC Docket No. 81–456 File No. BPCT-800409KF
UNITY BROADCASTING COMPANY OF WASHINGTON STATE, INC. Everett, Washington	BC Docket No. 81–457 File No. BPCT-800908KG
GREATER EVERETT TELECASTERS Everett, Washington	BC Docket No. 81–458 File No. BPCT-800908KH
CHANNEL 16, INC. Everett, Washington	BC Docket No. 81–459 File No. BPCT-800908KF
For Construction Permit for a New Television Station	

Appearances

B. Dwight Perry, *Christopher C. Smallwood*, *Noel Gunther*, and *Carolyn A. Wimbly*, on behalf of Oak Television of Everett, Inc.; *Curtis T. White*, *Edward Hayes, Jr.*, *Michael D. Jones* and *Ellen S. Mandell*, on behalf of Unity Broadcasting Company of Washington State, Inc., *E. William Henry* and *Peter A. Casciato*, on behalf of Greater Everett Telecasters; *Richard F. Kennedy*, on behalf of Channel 16, Inc.; and *Lawrence Bernstein*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

(Issued: November 2, 1982 Released: November 8, 1982)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Oak Television of Everett, Inc. (Oak), Unity Broadcasting Company of Washington State, Inc. (Unity), Greater Everett Telecasters (Telecasters), and Channel 16, Inc. (Channel 16), for a construction

permit for a new commercial television station in Everett, Washington. In a *Hearing Designation Order*, 46 Fed. Reg. 38751, published July 29, 1981, the applicants were designated for hearing on the following issues:

(1) To determine with respect to Oak Television:

(a) whether the applicant has $1,089,985 available to construct and operate the proposed station for three months.

(b) whether, pursuant to its Articles of Incorporation, the applicant is empowered to construct and operate a broadcast station in the state of Washington.

(c) whether, in light of the evidence adduced pursuant to (a) and (b) above, applicant is qualified to construct and operate as proposed.

(2) To determine with respect to Unity:

(a) the costs of operating the proposed station for three months.

(b) the cost of leasing or purchasing the applicant's proposed transmitter site.

(c) whether the applicant has $2,918,000 available plus the amounts shown to be required in issues (a) and (b) above.

(d) whether, in light of the evidence adduced pursuant to (a), (b) and (c) above the applicant is financially qualified to construct and operate as proposed.

(3) To determine with respect to Greater Everett:

(a) whether the applicant has the $3,155,141 available to construct and operate for 3 months.

(b) whether in light of the evidence adduced pursuant to (a) above the applicant is financially qualified.

(c) whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation, and if so, whether the applicant is technically qualified.

(4) To determine with respect to Channel 16:

(a) whether the applicant has the $1,511,679 available to construct and operate for three months.

(b) whether, in light of the evidence adduced pursuant to (a) above the applicant is financially qualified.

(5) To determine, on a comparative basis, which of the applications would best serve the public interest.

(6) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. The Designation Order further required that, in the event of a grant of the application of Channel 16, the construction permit include a condition that operation not be commenced until the permittee has certified to the Commission that Jon H. and Mary Ann Marple have divested themselves of all interest in, and severed all connections with, Station KRKO(AM) in Everett, Washington. The

Federal Aviation Administration was made a party respondent with respect to Issue 3(c).

3. On August 28, 1981, Oak filed Motions for Summary Decision with respect to Issues 1(a) through 1(c). By *Order*, FCC 81M-4013, released December 18, 1981 (and reflecting rulings made at a prehearing conference on December 16), the Motions were granted and Issues 1(a) through 1(c) were favorably resolved. On August 28 and October 29, 1981, Telecasters filed Motions for Summary Decision concerning Issues 3(a), 3(b) and 3(c), respectively. By *Order*, FCC 81M-4013, *supra*, the Motions were granted. On September 16, 1981, Channel 16 filed a Motion for Summary Decision as to Issues 4(a) and 4(b). By *Order*, FCC 81M-4013, *supra*, the Motions were granted. The sole qualifying issues remaining for hearing were thus Issues 2(a) through 2(d), relating to Unity's financial qualifications.

4. Prehearing conferences were held on October 1 and December 16, 1981. An admission session took place on January 29, 1982, and hearing sessions were conducted on February 2–4 and March 9, 1982. The record was closed by Order released March 23, 1982 (FCC 82M-0936). Proposed findings and conclusions were filed by the applicants and the Bureau on April 23, 1982 and replies to proposed findings were filed by Unity, Telecasters and Channel 16 on May 7, 1982.

Findings of Fact

Unity Financial Issues

5. Issue 2 was specified to determine Unity's construction and operating costs and whether Unity has $2,918,000 available plus any additional amounts required for the then undetermined costs of operating the proposed station for three months and the cost of leasing or purchasing the applicant's proposed transmitter site. However, since designation, Unity has altered both its plan of construction and operation and its means of financing the construction and operation of the proposed station.

6. As revised, Unity will require $1,321,790 to construct and operate for three months (Unity Ex. 12, p. 1). These construction and operational costs are itemized as follows:

Equipment costs	$ 986,790
Operating costs (including site leases)	225,000
interest on loan of Imperial Bank	75,000
Engineering fees	10,000
Legal fees	25,000[1]
	$1,321,790

[1] Legal fees in the amount of $75,000 have already been paid by Unity principal, Carl Washington from his personal funds. Mr. Washington does not expect

7. To meet these construction and operating costs, Unity relies on a $1.5 million commitment from the Imperial Bank of San Francisco, California, and $100,000 in stock subscriptions, on deposit at the Imperial Bank.[2] The Imperial Bank's commitment letters to Unity are in Unity Ex. 12, pp. 4–5. The Bank requires interest only on a quarterly basis for the first year, and interest and principal payable on a monthly basis thereafter. *Id.* The $75,000 in interest calculated into construction and operation costs assumes an interest rate of 20%. The Imperial Bank commitment is also predicated on the personal guarantees of Unity principals. Those guarantees have been furnished (Unity Ex. 12, pp. 6–12). Thus, Unity has shown the availability of funds totalling $1,600,000, to meet projected three-month construction and operation costs of $1,321,790.

Comparative Issue

Oak Television of Everett, Inc.

8. Oak is a Delaware Corporation capitalized with 1000 authorized and issued shares of common stock ($1.00 par value) (Oak Ex. 1, p. 1). Its officers and directors are as follows:

John P. Gwin San Diego, CA	Chairman of the Board of Directors
Werner R. Koester San Diego, CA	President/Director
Eugene M. Keys Poway, CA	Vice-President/Director
Ronald S. Comm Arlington Heights, IL	Treasurer/Director
E. Jeanne Hamm San Diego, CA	Secretary

repayment. He has an oral agreement with respect to repayment which Unity at its option may honor (Unity Ex. 12, p. 1; Tr. 280).

[2] Unity initially proposed at the hearing to prove that it had sufficient funds to construct and operate its proposed facility by means of a $1.5 million commitment letter from the Colonial Overseas Bank, located in the West Indies; stock subscriptions in the amount of $100,000, and a loan from Teleport Oil Company of $300,000. However, the reliability of Colonial Overseas Bank was called into question. See *Memorandum Opinion and Order*, FCC 82M-0303, released January 28, 1982, denying Unity's Motion for Summary Decision. Unity, after attempting to produce a representative from the Bank, called instead Dr. Oscar Murcia, a California businessman who was purportedly willing to lend Unity $1.5 million (Tr. 318, 319). However, Dr. Murcia subsequently testified that, as the management of Unity was presently constituted, he was unwilling to make a loan to Unity (Tr. 430, 432).

None of these individuals holds any ownership interest in Oak (Oak Ex. 1, p. 4).

9. Oak Industries, Inc. (Oak Industries) owns 100% of the outstanding shares of Oak. Its officers and directors are as follows:

Everitt A. Carter San Diego, CA	Chairman of the Board/ Director
Carl J. Bradshaw San Diego, CA	Senior Vice-President/ Director
Frank A. Astrologes San Diego, CA	Executive Vice-President/ Director
John P. Gwin San Diego, CA	Executive Vice-President/ Director
Raymond W. Pierce San Diego, CA	President/Director
Robert J. Hartney San Diego, CA	Vice-President
Michael G. Forys Poway, CA	Vice-President
Robert V. Dumke San Diego, CA	Vice-President
A. Keith Cook San Diego, CA	Vice-President
Jeanne E. Hamm San Diego, CA	Secretary
Thomas C. Runge San Diego, CA	Vice-President/Treasurer
John Yonco Western Springs, IL	Assistant Secretary
Franklin A. Cole Highland Park, IL	Director
Henry A. Correa New York, NY	Director
Vincent T. Gorguze St. Louis, MO	Director
Phillip S. Harper, Jr. Hinsdale, IL	Director
Robert T. McTigue River Forest, IL	Director
Dr. Leo Jedynak San Diego, CA	Senior Vice-President/ Director
Lawrence H. Rogers, II Cincinnati, OH	Director
Gary T. Barbera	Executive Vice-President/

Barrington, IL	Director
Michael R. Maury San Diego, CA	Vice-President/Controller
Eugene N. Meyer San Diego, CA	Vice-President/Staff Operations
Werner R. Koester San Diego, CA	Executive Vice-President
Howard L. McPherson Austin, TX	Vice-President/Manufacturing
Gary J. Goberville Solana Beach, CA	Vice-President/Human Resources

(Oak Ex. 1, pp. 1, 5, 7–9).

10. Oak does not hold or vote any interest in any other communications company, partnership or venture (Oak Ex. 2, pp. 1–4). Oak Industries and its various subsidiaries, however, have extensive other media interests. Oak Industries owns 100% of the licensee and is the STV franchise holder of WKID-TV in Ft. Lauderdale, Florida. *Id.* Through its subsidiary, National Subscription Television of Chicago, Inc., Oak Industries owns a 49% interest in the licensee (a joint venture) of WSNS-TV in Chicago, Illinois. (Oak Industries owns a 24.5 percent share of the joint venture licensee outright; it also owns 49 percent of another entity that owns 50 percent of the joint venture licensee.) *Id.* Oak Industries also owns a 50% interest in the STV franchisee of WSNS-TV. Another Oak Industries subsidiary, Oak Communications, Inc., owns NST Holding Co., Inc., and Oak Television, Inc., which own 49% and 51%, respectively, of the STV franchisee for KBSC-TV in Corona, California. *Id.* Oak Industries has transferred its 50% interest in the licensee of KBSC-TV to a voting trustee. *Id.* An Oak Industries subsidiary has filed a license application for a KBSC-TV translator station to serve three additional communities. *Id* at 2, n. 1. Oak Industries subsidiaries are the license applicants and proposed STV franchisees for three new STV stations in Denver, Colorado; St. Petersburg, Florida; and New Orleans, Louisiana. *Id.* at 3.

11. Oak Industries owns 100% of the STV franchise of Channel 45, Baltimore, Maryland (to decrease to 90% upon commencement of operation); 70% of the STV franchisee of Channel 15, Phoenix, Arizona; 60% of the STV franchisee of Channel 21, Ft. Worth, Texas; and 45% of the STV franchisee of Channel 29, Minneapolis, Minnesota. *Id.* at 3. Oak Industries also owns two cable systems. One system serves Oxnard, Hueneme, and parts of Ventura County, California; the other serves Castro Valley and adjacent communities in California. *Id.*[3]

[3] Oak did not disclose in its direct case or during the hearing the identities and ownership interests of the shareholders, if any, having a one percent or greater

12. Oak does not propose to integrate any of its ownership into the management of the proposed station. Oak's Board of Directors will monitor and control the station's overall performance, with day-to-day management in the hands of a fulltime general manager who will report to the Board. (Oak Ex. 1, pp. 1, 2). None of Oak's officers and/or directors reside in Everett (Oak Ex. 1, Appendix A).

Unity Broadcasting of Washington State, Inc.

13. Unity is a corporation formed under the laws of the State of Washington (Unity Ex. 2, p. 1). There are 100,000 authorized shares of common stock in Unity (Unity Ex. 2, p. 1). There is only one class of stock (Unity Ex. 2, p. 1). Each share carries one vote (Unity Ex. 2, p. 1). The stock has been paid for, but is not yet issued. (Tr. 74).

14. The officers and directors of Unity, and their respective stock ownership interests, are as follows:

Carl D. Washington President and Chairman of the Board of Directors	60,000 shares (60%)
Samuel E. Washington Secretary	15,000 shares (15%)
Calvin E. Burton First Vice President	10,000 shares (10%)
Dr. Thomas Arnold	5,000 shares (5%)
Carl C. Gipson Second Vice President and Treasurer	2,000 shares (2%)
Moyes Lucas	2,000 shares (2%)
Ms. Sharon Silverstone	1,000 Shares (1%)

(Unity Ex. 1, p. 1).[4]

15. Carl D. Washington, Samuel E. Washington, Calvin E. Burton, Dr. Thomas Arnold, Carl C. Gipson and Moyes Lucas are Black Americans. Therefore the corporation is 99% minority owned (Unity Ex. 1, p. 1). The remaining 1% is owned by Ms. Sharon Silverstone, a woman (Unity Ex. 1, p. 1).

16. None of the principals of Unity has any ownership interest in any other radio or television station, cable system, newspaper, or other medium of mass communication (Unity Ex. 3).

17. Unity proposes the integration of three of its stock subscribers into station management. Carl D. Washington, Chairman of the Board, Director, and 60 percent owner of Unity, is the proposed

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interest in its parent, Oak Industries, Inc. The record also does not disclose whether any such shareholders own or hold any interest in other communications companies or ventures.

[4] Five percent of the shares of Unity are being held in Treasury. These shares were formerly subscribed to by Clarence Hatch, who has withdrawn from the application (Tr. 253–4).

President and Chief Executive Officer of the station, as well as a member of its Executive Committee. He proposes to devote 30 hours per week to the station (Unity Ex. 4). Samuel E. Washington would be full-time General Manager of the station and would serve as a member of the Executive Committee. He is the Secretary, a Director, and 15 percent owner of Unity (Unity Ex. 4). As General Manager, he will be in charge of the day-to-day operation of the station including the implementation of sales, advertising and programming policies (Tr. 249–50). Calvin E. Burton, First Vice-President, a Director, and 10 percent owner of Unity would serve full-time as the station's Operations Manager and as a member of its Executive Committee (Unity Ex. 4). The commitment of Carl D. Washington, Samuel E. Washington and Calvin Burton to duties at the station would be paramount and would take precedence over any other conflicting time requirements were any to arise (Unity Ex. 4).

18. *Carl D. Washington* was born in Tuscaloosa, Alabama, on August 11, 1943 (Unity Ex. 2, p. 2). Mr. Washington has a Bachelor of Arts degree from Long Beach State University where he majored in Political Science and Speech (Unity Ex. 2, p. 2). From 1968 to 1970, Mr. Washington was a regional marketing *representative* for the Kellogg Corporation. In 1970, he founded Chem-Rex, Inc., a sanitary supply company, for which he served as President until 1974. In 1974, together with his brother Gene, Mr. Washington founded Washington Brothers Distributing Company, a liquor distributor in Northern California, operating until 1978, when the distributorship was sold. In 1979, Mr. Washington founded Teleport Oil Company, a wholesale oil distributorship, of which he remains President (Unity Ex. 2, p. 2). Mr. Washington has no prior broadcasting experience (Unity Ex. 2, p. 2).

19. Mr. Washington presently resides in Oakland, California, with his wife and daughter (Unity Ex. 2, p. 2). He intends to become a resident of the area of license if the construction permit is granted. Mr. Washington is a member of various civic and/or community organizations in the San Francisco/Oakland area (Unity Ex. 2, p. 3). He is also the recipient of the following public service awards: Black Chamber of Commerce Outstanding Business Service Award, 1981, City and County of San Francisco Board of Supervisors Outstanding Public Service Award, Business; and City and County of San Francisco Award of Merit for Outstanding Public Service (Unity Ex. 2, p. 3). However, there is no evidence that Mr. Washington has ever lived or ever been a member or officer of any organization in the Everett area.

20. *Samuel E. Washington* was born on November 24, 1949, in Tuscaloosa, Alabama (Unity Ex. 2, p. 4). Mr. Washington holds a Bachelor of Arts degree from UCLA. Following his graduation in 1971, he worked for the Sanitary Supply Company, Long Beach, California. From 1975 to 1981, he worked in Washington, D.C. as a

sales representative for Levi Strauss & Company (Unity Ex. 2, p. 4). In 1981 Mr. Washington took a medical leave of absence from Levi Strauss due to a back injury and was placed on long-term disability (Tr. 236–38). He is still employed by Levi Strauss pending the final processing on his long-term disability papers (Tr. 241–42). Although Mr. Washington can no longer lift the garment bags that his job at Levi Strauss required, he is able to perform other types of work (Tr. 237–48). Mr. Washington is of the opinion that he is physically capable of performing the tasks of General Manager (Tr. 249–50). No evidence was offered disputing this opinion. Mr. Washington has no prior broadcast experience (Tr. 242).

21. Mr. Washington is temporarily residing in San Francisco, California.[5] His permanent residence is in Washington, D.C. (Unity Ex. 2, p.4; Tr. 236, 244). Assuming grant of Unity's application, he intends to move to Everett or Seattle, Washington (Tr. 244). Washington is a member of the NAACP; the United Negro College Fund, and Kappa Alpha Psi, the National Black Fraternity (Unity Ex. 2, p. 5). However, there is no evidence that Mr. Washington has ever lived or ever been a member or officer of any organization in the Everett area.

22. Calvin E. Burton was born on March 29, 1942, in Anniston, Alabama (Unity Ex. 2, p. 6). Mr. Burton has a Bachelor of Arts degree from Morgan State University in Baltimore, Maryland. He also studied towards a Masters degree at Rutgers University, New Brunswick, New Jersey (Unity Ex. 2, p. 6). Mr. Burton joined the National Broadcasting Company (NBC) in 1968, working for NBC or its affiliate KNBC in various capacities in New York City and Burbank, California, for the next 11 years. From July, 1968, to April, 1970, he was Administrator/Equal Employment Programs, NBC-Corporate Staff. From April, 1970, to March, 1972, he was Administrator, Programs, of KNBC, Burbank, California. From March, 1972, to March, 1975, he was a Staff Producer at KNBC, involved in the development and production of local television programs (Unity Ex. 2, pp. 6–7). Between April, 1970, and about March, 1975, he was also involved in the purchase of several syndicated programs, including "Mouse Factory," the "John McKay Show," and the "Mary Tyler Moore Show." Mr. Burton's responsibility generally entailed identifying the available properties, working out cost details, negotiating contracts with talent and recommending time slots in which to air the programs. In executing these responsibilities, Mr. Burton consulted with KNBC's program manager, to whom he reported directly (Tr. 198–99). From March, 1975, to March, 1976, Mr. Burton was the Producer/Host of "Saturday Show," a public affairs program

[5] During his temporary stay in San Francisco, Mr. Washington has been working with the President of Channel 48 in order to familiarize himself with the operation of a television station (Tr. 242).

on KNBC; in that capacity, he also represented KNBC at various national, state, and local events (Unity Ex. 2, pp. 6–7). In April, 1979, Mr. Burton joined MEDIACOM, in Century City, California, as Director of Production and Programming. In April, 1979, as well, Mr. Burton founded Avandi II, Inc., a television production company in Hollywood, California. He left MEDIACOM in 1981 to devote more time to Avandi II (Unity Ex. 2, p. 7). Mr. Burton is President, Chairman of the Board, and 90 percent shareholder of Avandi II. There is one other shareholder in Avandi II, a senior vice-president of sales and marketing; otherwise, there are five regular employees and 15 free-lance employees (Unity Ex. 2, p. 7; Tr. 192). Mr. Burton relies on Avandi II and certain real estate investments for income (Tr. 202–03). He plans to retain his stock interest in Avandi II and remain its Chairman of the Board (Tr. 192). He currently spends 20 to 30 hours weekly working with Avandi II (Tr. 191, 194). In the event Unity obtains the construction permit, Mr. Burton will remain available for consultation with Avandi II, but only by telephone. Mr. Burton will divest his daily management responsibilities, which, pursuant to a letter of understanding, will be assumed by his brother-in-law, who is presently the Director of Operations and Management Development and Training for CBS records. His paramount commitment will be to the proposed station (Tr. 192–03, 203; Unity Ex. 4).

23. Mr. Burton was nominated for an Emmy Award for "The Jazz Show," "What's Going On," "The Saturday Show," and "Maybe It's All In My Mind." He has been awarded resolutions by the California State Assembly and the Los Angeles City Council for outstanding production of "What's Going On." He has received the National Association of Television Program Executives Award for Excellence in the Production and Broadcast of "Maybe It's All In My Mind" (Unity Ex. 2, pp. 8–9).

24. Mr. Burton presently resides in Los Angeles, California, with his wife and daughter (Unity Ex. 2, p. 6). If the construction permit is granted, he intends to become a resident of Everett (Unity Ex. 2, p. 6). Although his wife is presently employed in California, Mr. Burton testified that she will give up her job to move to Everett, and will look for work in Everett or Seattle (Tr. 213). Mr. Burton is a member of the Board of Directors of the Southern California Counselling Center (Unity Ex. 2, p. 8; Tr. 225–226). He is also an honorary member of the Board of the Directors of the Los Angeles Basin Equal Opportunity League (LABEOC) (Unity Ex. 2, p. 8). Mr. Burton has also been a member of the following organizations: the Black Producers Association,. Media Forum, NAACP, National Catholic Office for Radio and Television, Hollywood Chapter of the National Academy of Television Arts and Sciences, National Urban League, Public Affairs Committee, United Negro College Fund, Radio and Television Committee, the American Management Association, the

American Federation of Television and Radio Artists, and the Screen Actors Guild (Unity Ex. 2, p. 8). A number of these organizations have local chapters serving Everett (Tr. 225–26). However, Unity does not claim that Mr. Burton has ever lived in the Everett area or associated with an Everett or Seattle chapter.

Greater Everett Telecasters

25. Telecasters is a joint venture organized under the laws of the State of Washington (Telecasters Ex. B, p. 1). The names of the joint venturers and their respective ownership interests are as follows: FNI Communications, Inc. (67%); Linda D. Brown (11%); Yoshitada Nakagawa (11%); and Marilyn Joyce Wilkens (11%) (Telecasters Ex. B, P. 1). An oral agreement among the joint venturers, effective December 29, 1980, was reduced to writing and signed on January 13, 1981 (Telecasters Ex. B, p. 2). Samuel Schulman, Chairman of the Board of Directors and 45.2% owner of FNI, Inc., the parent of FMI Communications, Inc., is the Chairman of the Board of New Century Productions, Inc., and owns more than 50% of the stock of that company. He is the general manager and an 0.25% limited partner in SLM, a limited partnership. Both entities are involved in motion picture production (Telecasters Ex. A, p. 2). Leonard Wilkens, husband of Marilyn Joyce Wilkens, is the President, a Director, and a 26% shareholder in W-2, Inc., an applicant for a new FM radio station in Olympia, Washington (Telecasters Ex. A, p. 2). Neither Marilyn Joyce Wilkens, Yoshitada Nakagawa, or Linda D. Brown hold or vote any interest in a television or radio station, CATV system, newspaper, or other communications company, partnership or venture (Telecasters Ex. A, p. 2).

26. Telecasters proposes the integration of two of its owners into the management of the proposed station on a part-time basis. Marilyn Joyce Wilkens, owner of an 11% interest in Telecasters, will serve 20–40 hours per week at the station as Business Manager of Telecasters if its application is granted (Telecasters Ex. B, p. 1; Tr. 88). Linda D. Brown, owner of an 11% interest in Telecasters, will serve 20–40 hours per week as the station's Director of Public Service Broadcasting, assisting the general manager in the development of public affairs and other types of public service programming (Telecasters Ex. B, p. 1; Tr. 90). Anthony R. Tucker has been designated by FNI Communications, Inc., as its representative to carry out its responsibilities as a joint venturer (Telecasters Ex. B, p. 1). He has not proposed to hold a specific position or to work any specified hours at the station. Yoshitada Nakagawa has not agreed to hold a specific position or to work any specified hours at the station.

27. *Marilyn Joyce Wilkens* was born November 25, 1941 in New York City. She is a black woman who resides in Bellevue, Washington (Telecasters Ex. B, p. 1), a community near Everett, with her

husband, Leonard Wilkens, coach of the Seattle Supersonics professional basketball team. They have three children. Ms. Wilkens attended grade school and high school in New York City, going on to study liberal arts for two years in 1960–61 at Bronx Community College and Hunter College in New York. Since moving to the Seattle area in 1969, Ms. Wilkens has been involved in various community affairs. For the past two years she has been a member of the Board of Directors of the Seattle Urban League. Since the summer of 1981, she has been a member of the Boards of Directors of Seattle Community College, University of Washington Dental School, and the local Girls Club of America chapter. Also, Ms. Wilkens now serves as advertising spokesperson for Parkway Plaza, South Center Parkway, near Seattle, Washington. In 1980, she served as District Manager of the Seattle March of Dimes and was active in the Campaign to Pass Medic I (an emergency medical plan) for King County, Washington (Telecasters Ex. D). Ms. Wilkens claims no prior broadcast experience (Telecasters Ex. D).

28. *Linda D. Brown* was born on November 8, 1951 in Ida, Louisiana. Ms. Brown is a black woman who resides in Mercer Island, Washington (Telecasters Ex. B, p. 1), a community near Everett, with her husband, Fred Brown, a member of the Seattle Supersonics professional basketball team. Ms. Brown attended grade school and high school in Kansas City, Missouri. In 1969, she entered the University of Iowa as an undergraduate, studying business administration. After two years of college, Ms. Brown married and moved to the Seattle area where, in 1972, she returned to college, receiving a degree in business administration from Seattle University two years later. From 1977 until 1979, she worked as a sales agent with the real estate firm of Borge M. Meyer and Sons in Mercer Island, Washington. In late 1979, Ms. Brown became sales agent with Lister, Inc., another real estate firm in Mercer Island, Washington. Presently, Ms. Brown retains a real estate license although she is not active as a sales agent. In 1979, Ms. Brown formed the interior decorating firm of Linda D. Brown Interiors. During the past two years, she has been active as a Board Member of the United Way in the Seattle area. Ms. Brown claims no prior broadcast experience (Telecasters Ex. C).

Channel 16, Inc.

29. Channel 16 is a Washington corporation authorized to issue up to 50,000 shares of $1 par value voting common stock. Channel 16's officers and directors and their respective ownership interests are as follows:

Stanley B. McDonald Bellevue, WA	Director/250 shares (25%)
M. Lamont Bean Bellevue, WA	125 shares (12.5%)

Raymond E. Kusler Bellevue, WA	Director/125 shares (12.5%)
Jon H. Marple Everett, WA	President/Director/380 shares (38%)
Mary Ann Marple Everett, WA	Vice-President/Director/100 shares (10%)
Shirley K. Bartholomew Arlington, WA	Secretary/Treasurer/20 shares (2%)

(Channel 16 Ex. 1, p. 1; Tr. 110).

30. Messrs. McDonald, Kusler, and Bean own 40%, 20%, and 20% (non-voting), respectively, of Aurora Chicago Telecasters, Inc. (Aurora) (Channel 16 Ex. 4, p. 2). Aurora holds a 45% interest in HATCO-60, a joint venture and holder of a construction permit, granted by the Commission on November 19, 1981, to broadcast between the hours of 7:00 p.m. and 2:30 a.m. on Channel 60, West Chicago, Illinois (Channel 16 Ex. 4, p. 1). Messrs. McDonald, Kusler, and Bean thus, own, derivatively, through Aurora, interests of 18%, 9%, and 9%, respectively, in HATCO-60. *Id.* at p. 2. Messrs. McDonald and Kusler are also two of the five members of the HATCO-60 executive committee. *Id.* at p. 1. At the time of the hearing, Mr. and Mrs. Marple jointly owned 98% of the shares of stock and were officers and directors of First Pacific Broadcasting, Inc. (First Pacific), licensee of KRKO, an AM radio station in Everett. As noted *supra*, the Designation Order required the Marples to divest themselves of their interest in and sever all connection with KRKO prior to commencement of operation of the proposed station. By *Order* issued October 7, 1982, the Presiding Judge accepted Channel 16's amendment reporting that on September 14, 1982, Mr. and Mrs. Marple had transferred their 98% stock interest in First Pacific to Melvin Squyres and Dexter Taylor. Ms. Bartholomew is a 2% shareholder, officer and director of First Pacific. She has agreed to sell her interest in First Pacific if Channel 16 prevails herein (Channel 16 Ex. 4, p. 1). In this connection, Channel 16's amendment, discussed, *supra*, indicates that she has retained her 2% interest in First Pacific.

31. Channel 16 proposes the integration of two of its stockholders into station management. Jon H. Marple, President, Director, and 38 percent stockholder of Channel 16 is the applicant's proposed full-time General Manager (Channel 16 Ex. 1, p. 6). Mary Ann Marple, Channel 16's Vice President, Director, and 10 percent stockholder, is the applicant's proposed Public Affairs Director. She plans to work at the station full-time during its first year of operation, and part-time (30 hours per week) thereafter. *Id.*

32. Jon H. Marple was born May 5, 1940, in Wheeling, West Virginia. He has a Bachelor of Science degree from Brigham Young University and a Juris Doctor degree from the University of

Washington Law School. He is licensed to practice law in Ohio and the District of Columbia (Channel 16 Ex. 2, p. 1). Mr. Marple taught Constitutional history and business law between 1966 and 1967 at Central State University. In 1967, he became an associate at a Columbus, Ohio, law firm. Thereafter, he briefly worked as a lawyer for a Cincinnati, Ohio corporation, then joined the United States Department of Justice as a senior trial attorney in 1967. Approximately two years later, he joined the General Counsel's office at the Federal Communications Commission, leaving in 1979 to become a member of a Washington, D.C. law firm. In 1976, the Marples purchased the stock of Everett Broadcasting Co., licensee of Station KRKO in Everett, Washington, later changing the company's name to First Pacific Broadcasting, Inc. Mr. Marple has been the day-to-day manager of KRKO since he first purchased the stock (Channel 16 Ex. 2, pp. 1–2).

33. Mr. Marple resides in Everett, Washington with his wife, Mary Ann Marple and their four children. Since moving to Everett in 1976, Mr. Marple has associated with or served on the following civic and community organizations: Greater Everett Chamber of Commerce (Vice President, 1977–1980); General Hospital of Everett (Trustee, 1976–79); Snobomish County Junior Tennis Foundation (Director, 1978–present); Greater Everett Athletic Round Table (Director, 1979–present); Superstar Competition for Special Olympics in Snohomish County (Director, summer 1980) (Channel 16 Ex. 2, p. 1, 3). Mr. Marple has also been a committee member at one time or another over the past five years of the following committees: Mukilteo Boys Club, the Everett Salty Sea Days Celebration, the March of Dimes Committee for Snohomish County, and the Heart Fund (Channel 16 Ex. 2, p.3). Mr. Marple does not know whether he will be associated with the Everett Salty Sea Days Celebration this year; he is not active at present with the Heart Fund (Tr. 538–539). For those community activities requiring public solicitation of funds such as the Heart Fund and the March of Dimes, Mr. Marple testified that his involvement consisted in part of the donation of public service announcements via Station KRKO (Tr. 541–542).

34. Mary Ann Marple was born December 24, 1938 in Pledger, Texas. She has a Bachelor of Arts degree from Western Washington University and has been on leave of absence for three years from the University of Washington in Seattle where she was working towards a Masters degree in Educational Policy Studies (Channel 16 Ex. 3, p. 1). At present, she is 15 credits short of qualifying for that degree (Tr. 455–456). Should she remain on leave of absence for a total of five years, she would have to obtain special permission to re-establish herself as a graduate student without losing any credits towards her degree (Tr. 456, 467, 470). Ms. Marple intends to become a full-time student this summer in connection with her efforts to obtain a Masters degree, but does not know what courses are available or the

deadline for summer applications (Tr. 467–468). However, she has testified that if necessitated by her working schedule at the proposed station, she would defer her efforts to obtain her Masters degree (Tr. 468–469).

35. From 1976 to 1978, Ms. Marple worked as office manager and in public relations at KRKO. Her experience in the area of public affairs is limited to having interviewed community members and leaders in connection with KRKO's license renewal (Channel 16 Ex. 3, p. 1; Tr. 436). Otherwise, there is no record evidence that Ms. Marple has any past broadcast experience. Since the fall of 1978, Ms. Marple has been a teacher in the Snohomish School District, Washington, where she is now employed as a sixth grade teacher. Ms. Marple testified that she has a commitment from her employer that she may obtain a one year's leave of absence should Channel 16 obtain a construction permit (Tr. 439, 443). She has explored with her employer the possibility of taking a second year's leave of absence, but has no commitments in that regard (Tr. 440). It is her present understanding, however, that she will return to her present teaching job full-time after the first year's leave of absence (Tr. 458, 495). Thus, in the proposed station's second year of operations, Ms. Marple intends to work full-time as a teacher, from 8 a.m. until 3:30 p.m., five days per week during a nine-month period, and 30 hours weekly at the station as well (Tr. 458–459, 503).

36. Ms. Marple testified that her duties as the proposed station's Public Affairs Director would consist of "[i]nteracting with community members and leaders as to what their concerns and needs would be, attempt to provide adequate forum of expression for those concerns and needs" (Tr. 437). She stated that Channel 16 has proposed three one-half hour public affairs programs, but that she will have no responsibility for producing, directing, or editing any of these programs (Tr. 437, 463, 487–488). In addition to her information-gathering functions, Ms. Marple testified that she will be involved in the public affairs programming "as an advisor," (Tr. 462), that she would offer advice as to program content, (Tr. 464), and that her chief task would be interacting with the community (Tr. 463). Ms. Marple stated that she would supervise those station employees conducting on-the-air interviews, and would require them to furnish her with their proposed questions beforehand. She would have authority to disapprove of the questions, although she stated, "I don't know as I'd be dictatorial about it" (Tr. 486). However, a station employee could ask a follow-up question without her approval. In this connection, Channel 16's call-in and panel shows will be live (Tr. 487–88). In the event that community members themselves conducted on-the-air interviews, Ms. Marple might supervise only the program's moderator (Tr. 489). In that event, she does not know who else she might supervise (Tr. 490).

37. With respect to the second year of operation. Ms. Marple

testified that her 30 hours weekly commitment would involve working at the station on a daily basis - in the evening, late afternoon and on the weekend (Tr. 461). However, she does not have any "structured time" and it was speculation on her part whether she would be able to fulfill that commitment (Tr. 459). She conceded that she may not be able to work 30 hours (Tr. 459–60). Unlike the first year, Ms. Marple intended to limit her interaction with community leaders to 4:00 p.m. to 5:30 p.m. and at council meetings and fund raising drives, held in the evening (Tr. 463–66). The extent to which she would be working for the station depended on whether there were meetings in the evening which were necessary for her to attend and the availability of community leaders in the time period of 4:00 p.m. to 5:30 p.m. (Tr. 463–64). She conceded the possibility that in some weeks she could be working for less than 30 hours (Tr. 466). If sufficiently important events occurred during the hours she would otherwise be teaching, Ms. Marple suggested she might take leave from her teaching job, although she has only 12 days sick or emergency leave before losing pay (Tr. 490–492). She admitted that such events would in all likelihood occur, and that she would not attempt both to cover those events on a regular basis and teach (Tr. 493–494). She stated that in her second year she would delegate the work she would otherwise have accomplished in the ten hours weekly that she would no longer spend at the station, but she was unclear as to what work that might be (Tr. 484–485), and, in any event, she had not yet set priorities for herself in terms of her projected workload (Tr. 485). She also stated that there was no present intent to hire someone to fill in for her part-time in her second year (Tr. 474–475).

38. Ms. Marple has been a volunteer for the Snohomish County (Washington) Junior Tennis Foundation since 1978. In 1979, she was a volunteer fundraiser for the American Heart and Cancer drive in the Everett, Washington community (Channel 16 Ex. 3, p. 1; Tr. 453–454). From 1976 to the present, she has been a member of several local Parent-Teacher Associations. She has been a member of the Snohomish Education Association, and a member of the Washington Education Association and the National Education Association from 1977 to present. From 1979 to 1980, she worked on curriculm development committees and an advisory committee to the Snohomish School District. She is now a volunteer in the clinical supervision program, designed to improve classroom instruction in the Snohomish School District (Channel 16 Ex. 3, p. 2).

CONCLUSIONS

Unity Financial Issues

39. Unity will require $1,321,790 to construct and operate for three months. To meet these projected costs, Unity relies on a $1.5

million commitment from the Imperial Bank of San Francisco, and $100,000 in stock subscriptions, presently on deposit at the Imperial Bank. Under the terms of the Imperial Bank commitment, Unity would pay interest only for the first year, with principal and interest payable thereafter on a monthly basis. The $75,000 in interest calculated in Unity's cost estimate assumes an interest rate of 20%, substantially higher than the current prime rate. Unity's principals have provided the guarantees required by the Imperial Bank commitment letter. Thus, Unity has established the availability of $1.6 million to meet projected costs of $1,321,790. Oak argues that the bank loan may not be relied on since the interest rate has not been specified, citing *West Central Investment Co., Inc.*, 43 RR 2d 797 (1978). However, Oak has ignored Commission precedent recognizing the validity of an otherwise unconditional loan commitment which leaves terms and conditions to be settled at the time of consumnation. For example, see *Connecticut Coast Broadcasting Co.*, 8 RR 2d 1007 (Rev. Bd. 1966), *reconsidered*, 9 RR 2d 839 (Rev. Bd. 1967); *Rose Broadcasting Company*, 43 RR 2d 1317, 1325–26. In addition, unlike the facts in *West Central*, Unity's cost estimate includes an amount for interest payments based on an interest rate of 20%, which, as noted, *supra*, is substantially higher than the current prime rate. In addition, Unity has a cushion of $268,110 in the event that a higher rate must be paid. Under the circumstances, reasonable assurance as to the availability of the bank loan has been demonstrated. It is therefore concluded that Unity has established it is financially qualified and issue 2 is resolved in Unity's favor.

Comparative Issue

40. The comparative issue must be decided in accordance with the Commission's Policy Statement on *Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.* (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

41. Unity's principals do not own any media interests. Samuel Shulman, 45.2% owner of FNI, Inc., the parent of FNI Communications, Inc., one of Telecasters' joint venturers, has interests in entities involved in motion picture production. No evidence has been offered showing that Mr. Shulman's interest in such production companies undermines the objectives underlying the principle of diversification of control of mass media. Therefore, the production companies can not be considered to be communications media for purposes of comparative evaluation. *Morris, Pierce & Pierce*, 88 FCC 2d 713, 723, 724 (Rev. Bd. 1981). Channel 16's principals Mr. and Mrs. Marple have sold their interests in KRKO, Everett, Washing-

ton. Ms. Barthomew has apparently retained her 2% ownership interest in KRKO but has stated her intention to sell the interest if Channel 16 prevails in this proceeding. Three other principals, Messrs. McDonald, Kusler and Bean, own an 80% interest in Aurora Chicago Telecasters, Inc., which holds a 45% interest in Hatco-60, the permittee of a West Chicago television station (Channel 60), which broadcasts between the hours of 7:00 p.m. and 2:30 a.m. Considering the fact that the total ownership interest of the Channel 16 principals in Hatco is not controlling (36%), the distance from Chicago to Everett (over 2,000 miles) and that the West Chicago station operates a limited number of hours on a shared time basis, it is concluded that only a slight comparative demerit is justified. On the other hand, although Oak owns no other media interests, its parent, Oak Industries Inc. and various subsidiaries own extensive media interests throughout the United States. See paragraphs 10–11, *supra*. Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement*, 1 FCC 2d at 394–5. Since these holdings are not in or close to the community applied for and appear to be geographically diffuse, Oak will receive a moderate, rather than substantial demerit. In summary, Unity and Telecasters will be awarded a slight diversification preference over Channel 16 and a moderate diversification preference over Oak.

Best Practicable Service To the Public

42. In determining which application will insure the best practicable service to the public, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement*, *supra*, at 395. The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Thus, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79–397, released June 22, 1979.

43. Oak does not propose to integrate any of its ownership into the management of the proposed station. Unity proposes the integration of three of its stockholders into station management.

Samuel E. Washington, 15% stockholder, is proposed as full-time general manager and a member of the Executive Committee. Calvin E. Burton, 10% stockholder, is proposed as full-time operations manager and a member of its Executive Committee. Carl D. Washington, 60% owner of Unity, the proposed President, and Chief Executive Officer, as well as a member of the Executive Board, intends to devote 30 hours per week to the station. Thirty hours per week qualifies as substantial but not full-time. *Van Buren Community Service*, 87 FCC 2d 1018, 1021 (Rev. Bd. 1981). Unity will receive credit for 25% full-time and 60% substantial integration. Telecasters and Channel 16 challenge Carl Washington's integration proposal, arguing there is serious reason to doubt whether he will actually keep his commitment to work 30 hours a week. They rest their arguments on the fact that he presently serves as the President of Teleport Oil Company, a wholesale oil distributorship which he founded. These arguments are without evidentiary support and are based solely on speculation and surmise. They will be rejected. Mr. Washington has stated unequivocally on the record that performance of his duties at the proposed station will be paramount and will take precedence over any other conflicting time requirements should any arise (Unity Ex. 4, p. 1). Mr. Washington has further stated he intends to move to the license area. No evidence has been introduced which undermines these commitments. It is also urged that Mr. Washington's position in day-to-day management will be of a consultative nature and should not be credited. This contention is similarly grounded on speculation and surmise. The common business usage of the terms "Chief Executive Officer" and "President" reflects high-level, policy-oriented executive positions. Telecasters' reliance on *Grand Broadcasting Co.*, 36 FCC 2d 925 (1964), is inapposite. In setting forth certain job titles which would be accorded "particular weight", the Commission pointed out therein that positions with comparable responsibility but utilizing different titles are equated with those listed. *Id.* at 929. The position to be held by Mr. Washington, President/CEO certainly entails important, policy-level management responsibility. Awarding credit to him is fully consistent with *Grand* and the Commission's *Policy Statement*. No record evidence has been cited indicating that Mr. Washington will not perform in the traditional manner of a President/CEO. On the contrary, his intention to move from Oakland, California to the Everett area provides assurance that he intends to fulfill that role. It is also argued that the quantitative credit for Unity's integration proposal is somewhat lessened because Carl Washington and Samuel Washington have no prior broadcast experience. However, it is a fundamental premise that lack of experience is remediable. *Policy Statement*, *supra*, 1 FCC 2d at 396, footnote 8. There is no basis for questioning an integration proposal merely because it is proffered by a newcomer to broadcasting. Unity will receive credit for 25% full-

time and 60% substantial integration. The qualitative attributes of Unity's integrated owners enhance its proposal. Specifically, Unity is awarded a "plus-factor" for its 25% full-time and 60% substantial minority ownership. In addition, Calvin Burton's employment at NBC and its affiliate KNBC covering a period of 11 years entitles him to credit for prior broadcast experience. Unity's integrated principals have been actively involved in the affairs of the communities in which they reside. Carl D. Washington and Mr. Burton have received awards in recognition of their distinguished service. However, Unity's integrated principals have never lived in or near Everett or been involved in Everett area activities. Consequently, no credit can be accorded for local residence and past participation in civic affairs. Unity's principals have expressed an intention to move to either Everett or the Everett area. Proposed future local residence, is also accorded weight, although to a lesser degree than present local residence. *Policy Statement*, 1 FCC 2d at 396.

44. Telecasters proposes the integration of two of its owners into the management of the proposed station. Marilyn Joyce Wilkens, owner of a 11% interest, proposes to serve 20–40 hours at the station as Business Manager. Linda C. Brown, owner of an 11% interest also proposes to serve 20–40 hours as the station's Director of Public Service Broadcasting. Since their work proposal has been stated in terms of a minimum and maximum amount of time, only the minimum time will be credited. *Midwest, supra*. Telecasters will receive credit for 22% part-time integration of ownership and management. Telecasters' integration proposal is qualitatively enhanced in that Ms. Wilkens and Ms. Brown are Black women. In addition, although neither reside in Everett, both reside within the proposed service area. Telecasters' proposal is further enhanced by Ms. Wilkens' and Ms. Brown's participation in civic affairs within the proposed service area. Although, Ms. Brown's participation in civic affairs is not as extensive as Ms. Wilkens', her involvement during the past two years as a Board member of the United Way in the Seattle area also indicates a knowledge of and interest in the welfare of residents within the proposed service area. Telecasters also contends it is entitled to residual merit based upon the participation of Yoshitada Nakagawa, an Asiatic male and a resident of Mercer Island, Washington. Mr. Nakagawa will not participate in the day-to-day management of the proposed station. Telecasters' request for residual merit rests on the assertion that Mr. Nakagawa together with the other joint venturers will manage the affairs of the joint venture pursuant to the Memorandum of Understanding executed January 13, 1982 (Telecasters Ex. B, p. 2 and Attachment 1). However, Mr. Nakagawa has made no time commitment. In order to receive residual merit an eligible principal must participate to some degree in station affairs, although not enough to receive integration credit. Participation means a specific time commitment.

Midwest, supra. Since Mr. Nakagawa has made no time commitment, residual merit cannot be awarded.

45. Channel 16 will receive credit for the full-time participation as General Manager of Jon H. Marple, President, Director, 38% stockholder. This integration credit is qualitatively enhanced by Mr. Marple's local residence and active participation in local civic activities (see paragraph 33, *supra*), and broadcast experience as manager of FM station KRKO since 1976.

46. Channel 16 also proposes that Mary Ann Marple, Vice President, Director, and 10% owner will be the Public Affairs director full-time during the station's first year, and for 30 hours per week thereafter. Ms. Marple can not receive credit for full-time integration since that integration proposal will not be adhered to on a permanent basis. *Policy Statement*, 1 FCC 2d at 395, footnote 6. Ms. Marple's proposed integration in succeeding years also can not be credited since she has not demonstrated a reasonable likelihood that she will be able to effectuate her proposal to work 30 hours a week. Ms. Marple proposes to combine 30 hours per week at the station with a full-time position as a sixth grade teacher (8:00 a.m. - 3:30 p.m., plus the additional time necessary to prepare for her duties). In addition, she also intends to continue her studies for a Masters degree in Educational Policy Studies. She is currently 15 credits short of qualifying for that degree. In light of Ms. Marple's extensive commitments, her professed intention to devote 30 hours a week to station affairs must be dismissed as inherently incredible. In this regard, Ms. Marple admitted that it was speculation on her part whether she would be able to fulfill her integration proposal. She has conceded that she may not be able to work thirty hours and that in some weeks it was possible she could be working far less than 30 hours. Ms. Marple's integration proposal must also be rejected for another reason. Ms. Marple will have the title "Public Affairs Director." However, Ms. Marple's duties essentially consist of gathering information as to the needs of the proposed community. Ms. Marple's only supervisory responsibilities would consist of reviewing questions before employees conducted on-the-air interviews. Ms. Marple's ability to perform this function while she worked full-time is not subject to question. However, her ability to do so in succeeding years when she would be working only in the late afternoon, evenings, and weekends is subject to great doubt. Moreover, her review of questions appears to be nothing more than an extension of her information-gathering activities, rather than a policy making function. Moreover, Ms. Marple would have no control over follow-up questions or over panel shows conducted by non-employees. Of prime importance, she will have no responsibility for producing, directing, or editing any of Channel 16's proposed public affairs programs. Aside from information-gathering functions, Ms. Marple's only involvement in public affairs programming would be

as an advisor. It is thus apparent that although Ms. Marple will have the title of "Public Affairs Director," in fact, she will not perform any management and policy functions. Integration credit is based on owner participation in management of the station. *Policy Statement, supra*, 1 FCC 2d at 396–6. Although Ms. Marple will be active at the station, her role is plainly non-managerial and cannot be credited. See *Bradley, Hand and Triplett*, 51 RR 2d 383, 386 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 839 (Rev. Bd. 1981). For the reasons noted, Ms. Marple will not be given integration credit. However, she is entitled to an award of slight residual merit for local residence and civic participation since she intends to devote some time to station affairs. See *Midwest, supra*. Channel 16 will, therefore, receive 38% full-time participation and slight residual merit for Ms. Marple's proposed participation.

47. *Integration Summary* - Oak does not propose to integrate any of its ownership into the management of the proposed station. Unity has received credit for 25% full-time and 60% substantial (30 hours) integration. Unity's integration proposal is qualitatively enhanced by the participation of 85% minority ownership, previous broadcast experience of Mr. Burton and future residence of the integrated stockholders in or near Everett. Telecasters receives credit for 22% part-time integration. Telecasters' integration proposal is qualitatively enhanced in that Ms. Wilkens and Ms. Brown are Black women, both reside and have participated in civic affairs within the proposed service area. Channel 16 has received credit for 38% full-time integration. Channel 16's integration proposal is qualitatively enhanced by Mr. Marple's local residence, civic participation, and broadcast experience. Channel 16 also receives slight residual merit for Ms. Marple's proposed participation. Unity's proposal deserves a substantial preference over Oak and Telecasters and a slight preference over Channel 16. Oak proposes no integration and Telecasters' proposed 22% part-time integration is far inferior to either Channel 16's or Unity's integration proposals. As between Unity and Channel 16, the 13% differential between Unity's and Channel 16's full-time integration proposal is more than offset by Unity's additional 60% substantial integration. See *Van Buren*, 87 FCC 2d 1021–22.[6] In addition, since Unity, unlike Channel 16, proposes to integrate a majority of its stock ownership (85%), its proposal furthers the Commission goal of maximum ownership

[6] In *New Continental, supra*, the Review Board held that an applicant proposing 65% full-time integration warranted a slight preference over an applicant proposing 52.5% full-time / 37.5% part-time integration. This case is distinguishable from *New Continental* since Unity is proposing substantial, rather than part-time integration. In addition, as discussed, *infra*, unlike Channel 16, the winning applicant in *New Continental* proposed integration of a majority of stock ownership into the operation of the station.

participation in station affairs. See *Policy Statement, supra,* at 395; *Pleasant Broadcasting Co.,* 40 FCC 2d 582, 587 (Rev. Bd. 1973); *Gilbert Group, Inc.,* 50 RR 2d 81, 92 (Rev. Bd. 1981).

Other Comparative Factors

48. Telecasters and Channel 16 propose to install an auxiliary power generator (Telecasters Ex. E; Channel 16, Ex. 5). Unity and Oak do not propose to provide an auxiliary power supply. However, Telecasters and Channel 16 are not entitled to a preference. In its *Addendum* to the *Policy Statement,* 2 FCC 2d 677 (1967), the Commission stated that it "considers it appropriate to add the acquisition and proposed use of auxiliary power equipment as a factor of decisional significance in comparative AM and FM broadcast proceedings." The Addendum makes no mention of comparative TV proceedings and no cases have been cited where the proposed use of an auxiliary power generator has been credited in a comparative TV proceeding. *Robert M. Zitter,* 59 FCC 2d 274 (Rev. Bd. 1976) and *Enterprise Broadcasting, Inc.,* 56 FCC 2d 352 (Rev. Bd. 1975), cited by Telecasters, were not comparative TV proceedings.

Final Comparative Evaluation

49. Unity has received a slight diversification preference over Channel 16 and a moderate diversification preference over Oak. Unity's integration proposal deserves a substantial preference over Oak and Telecasters and a slight preference over Channel 16. When these preferences are weighed Unity is the winner. It is therefore concluded that a grant of Unity's application will better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Unity Broadcasting Company of Washington State, Inc. IS GRANTED and the applications of Oak Television of Everett, Inc., Greater Everett Telecasters and Channel 16, Inc. ARE DENIED.[7] [8]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN *Administrative Law Judge*

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[8] The Petition For Leave To Supplement Proposed Findings of Fact And Conclusions Of Law filed April 26, 1982 by Unity is granted and the supplement accepted.

Application, Mutually Exclusive
Common Carrier, Mobile Radio
Hearing, Procedure
Land Mobile Service, Private
Lottery
Television, Low Power

Commission establishes rules for selecting initial licensees by lottery in lieu of comparative hearings in certain Mass Media, Private Radio and Common Carrier Services. Where lotteries are used in Mass Media Services, minority and diversity preferences will be given. Preferences are not available, however in the Private Radio and Common Carrier Services.
-Random Selection/Lotteries
Gen. Docket No. 81-768

FCC 83-114

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings	Gen. Docket No. 81-768

SECOND REPORT AND ORDER

(Adopted: March 31, 1983 Released: May 27, 1983)

BY THE COMMISSION: CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES CONCURRING AND ISSUING A STATEMENT; COMMISSIONER DAWSON CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER SHARP CONCURRING IN THE RESULT.

I. *Introduction and Overview*

1. *Introduction.* In this proceeding, the Commission is adopting rules to implement a system of random selection or lotteries to choose licensees from among certain competing applicants. The Commission released a *Second Notice of Proposed Rule Making*

("*Notice*") in this matter on October 7, 1982. 47 Fed. Reg. 45046, (October 13, 1982). Numerous comments and reply comments have been received in response to our proposals.[1] We have carefully analyzed the lottery statute, the accompanying *Conference Report*,[2] the *Notice* and the comments (initial and reply). It is our view that the best interest of the public will be served by adopting regulations to implement a lottery system for issuing licenses in certain enumerated services. The specific framework for implementing the lottery authority is set forth below. Particular emphasis is given to the Low Power Television and Television Translator Service ("LPTV") because of the comp exity involved in using a lottery in that Mass Media service.[3]

2. In the *Notice*, the Commission proposed to use a lottery to select licensees in LPTV, as well as certain private radio an common carrier services. The proposed lottery rules for LPTV differed significantly from the proposals for the other services due to the statutory mandate that "significant preferences" be incorporated into any mass media lottery selection system. In addition to the low power service, a lottery will also be available for use in Private Land Mobile, Operational Fixed Microwave, Aviation and Maritime Services in the Private Radio Bureau and in the Public Land Mobile Service (except cellular) in the Common Carrier Bureau.

3. Lotteries will be used across the board in LPTV and in the public land mobile radio services. In the Private Radio area, however, lotteries will be used on a case-by-case basis. This result is warranted in Private Radio because in some cases expedition does not outweigh consideration of other public interest factors, *e.g.*, public safety and more efficient uses of the spectrum.

4. *LPTV Issues.* The new lottery statute requires that minority and diversity preferences be given to certain mass media applicants. The preference scheme adopted herein is essentially the same as described in the *Conference Report* and the *Notice*. Preferences will be available for:

(a) applicants more than 50% controlled by minorities (a 2:1 preference);

(b) applicants whose owners control no other media of mass communications (a 2:1 preference); and

(c) applicants whose owners control 1, 2 or 3 other media of mass communications (a 1.5:1 preference).

5. The latter two preferences, termed the "diversity" preference,

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[1] *See* Appendix A for a list of participants in this proceeding. A brief summary of the comments filed in this proceeding is included in the text; a more thorough comment summary appears in Appendix B.

[2] H.R. Rep. No. 765, 97th Cong., 2d Sess. (1982).

[3] All references to "LPTV" or "low power" include television translators except when otherwise stated.

reflect the applicant's other ownership interests in any media of mass communications. Applicants may qualify for both the minority and diversity preference.

6. *LPTV Pre-Hearing Lottery Procedure.* Acceptability for filing and cut-off procedures will basically operate as they do now in LPTV. A strict multiple application rule is adopted that bars the filing of any LPTV application that would be directly mutually exclusive with any pending application filed by the same applicant or by an applicant where there is *any* direct or indirect interest of one per cent or more.

7. A two-track approach for filing Petitions to Deny is adopted for use in LPTV. The first approach will require that Petitions to Deny be filed after a "tentative selectee" is chosen. The second approach requires a two-step process. First, a preliminary notice of Petition to Deny will be filed prior to conducting a specific lottery. Then, after a successful applicant is chosen, those parties that preserved their objections may file formal Petitions to Deny; other parties may participate in the formal post-lottery petition process only if good cause is shown. Conversely, in the Common Carrier and the Private Radio Services, Petitions to Deny, where they properly lie, will be filed prior to the lottery and will be considered post-lottery only with respect to the "tentative selectee."[4]

8. After consideration of any Petitions to Deny and staff examination of the application, the Commission will determine whether a grant can be made or whether a hearing is required.

9. Hearings ordinarily will be conducted on paper before the Commission. In those cases where a paper proceeding cannot resolve certain questions of fact, oral testimony will be heard by an Administrative Law Judge ("ALJ") who will issue an Initial Decision. Exceptions to the Initial Decision may be filed with the Commission. Ordinarily, Bureau counsel will participate only where the Commission refers an issue to an ALJ. Following a paper hearing, the Bureau staff will prepare an Order for Commission approval. In the case of an oral hearing, this action will be taken by the Adjudication Division of the Office of General Counsel. If the "tentative selectee" is found unqualified, a second applicant from the same pool will be selected.

II. *Background and Statutory Authority*

10. For several years, the Commission has considered in different contexts the possibility of using lotteries as a means of allocating licenses to use the electromagnetic spectrum. *Notice of Proposed Rule Making (LPTV)*, BC Docket No. 78–253, 82 FCC 2d 47 (1980); *Notice of Inquiry and Proposed Rule Making*, CC Docket No. 80–116

[4] In many PRB services, Petitions to Deny are not authorized; the Bureau considers oppositions to applications as informal complaints.

45 Fed. Reg. 29335 (May 2, 1980); *Alexander S. Klein, Jr.*, FCC 79–401 (released August 3, 1979). In none of these cases did the Commission make a legal conclusion that it, in fact, possessed adequate legal authority to use lotteries in lieu of a comparative process.

11. The Commission first received explicit statutory authority to use a lottery in Public Law No. 97–35, the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 736–37, which added Section 309(i) to the Communications Act of 1934, 47 U.S.C. § 309(i). On November 17, 1981, we issued a first *Notice of Proposed Rule Making* requesting comments on a proposed implementation plan for the lottery statute. 88 FCC 2d 476 (1981). In our first *Report and Order* in this proceeding we declined to implement our authority to establish a lottery system because of our inability to structure a workable lottery system within the constraints of the statute. 89 FCC 2d 257 (1982). New lottery legislation was subsequently enacted in the second session of the 97th Congress.

12. The revised lottery statute provides:

> (1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.
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> (2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law -
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> (A) adopt procedures for the submission of all or part of the evidence in written form;
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> (B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and
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> (C) omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).
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> (3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.
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> (3)(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such

preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The Commission, not later than 180 days after the date of the enactment of the Communications Technical Amendments Act of 1982, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(4)(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

47 U.S.C. § 309(i).

13. The Commission's new lottery authority contains four significant provisions. First, the Commission is expressly empowered to use a lottery to grant initial construction permits or licenses among competing applicants if the public interest would thereby be served. Next, the Commission's administrative burden in conducting the lottery is reduced because it is only required to determine that the applications are acceptable for filing prior to the lottery. A full qualifications check of *only* the successful applicant need be made *after* the lottery is conducted. Third, when lotteries are used for allocating "mass media" licenses, *i.e.*, those broadcast-type services where the licensee retains editorial control over the medium, the lottery must be weighted with "significant preferences" allocated to minority group applicants and those who own few or no other media of mass communications. In non-mass media services, however, the lottery will be conducted strictly on a random basis. Finally, the Commission is authorized to use lotteries "in any instance," in its discretion, where it is determined appropriate after promulgating rules in a formal rule making proceeding.

III. *Mass Media Comments*

14. In the *Second Notice*, the Commission proposed that as to services within the jurisdiction of the Mass Media Bureau, lotteries be used in contested cases in the low power television and television translator service (hereinafter "LPTV") and in other services on an *ad hoc* basis when the parties' qualifications are such that no material difference between their ability to serve the public interest can be distinguished. The *Notice* proposed a comprehensive scheme

for the conduct of lotteries, including the use of preferences designed to increase minority ownership and enhance ownership ownership diversity generally.

15. Comments received in response to the *Second Notice* cover such matters as whether use of lotteries is consistent with the Commission's public interest obligations, whether the preferences proposed are large enough to be "significant," as the statute requires, and how various ownership interests, such as limited partnerships, will be treated in the preference scheme. A complete summary of the comments is found in Appendix B.

IV. *Mass Media Discussion*

16. *Decisional Criteria for Employing Lotteries.* The *Conference Report* accompanying the new legislation sets forth a number of factors Congress suggests that the Commission consider in determining whether the public interest would be served by utilization of lotteries in particular services or instances. These include:

> [W]hether there is a large number of licenses available in the particular service under consideration; whether there is a large number of mutually exclusive applications for each license, for example, when a new service is initiated; whether there is a significant backlog of applications; whether employing a lottery would significantly speed up the process of getting service to the public; and whether selection of the licensee will significantly improve the level [of] diversity of information available in the community versus the use of the traditional comparative hearing process.

Conference Report at 37.

The *Report* emphasizes that the Commission must, having considered all relevant factors, find that a significant public interest benefit would flow from use of lotteries in the specified circumstances. To do otherwise, the Conferees state, would "disserve the Commission's ultimate statutory goal of obtaining the best practicable information service from diverse sources." *Id.*, at 38. Moreover, the Conferees also state that the factors described above are not to be applied mechanically or without regard to other relevant considerations. *Id.*

17. The *Conference Report* concludes that under the criteria suggested, the Commission would be justified in using, and is in fact encouraged to use, a lottery system in LPTV licensing. LPTV is described by the Conferees as:

> [T]he ideal service for which to use a lottery, given the large number of licenses available, the large number of mutually exclusive applications for each license, the substantial backlog of applications on file with the Commission, the likelihood that use of lottery is essential to expediting the process of getting low power television service to the public, and the likelihood that bringing low power television service to the public quickly, through the use of a lottery, will result in a significant increase in the diversity of information sources available in many communities throughout the country.

Conference Report at 38–39.

18. Thus, it is clear that Congress amended the Communications Act to permit lotteries based on the belief that in certain circumstances the public interest is best served by the rapid commencement of new station operations which a lottery makes possible. Those commenters who claim that any Commission implementation of licensing by lottery would violate our public interest obligations under the Act fail to confront this fact. The Commission concurs in the Conferees' judgment that in the Mass Media services, LPTV is a particularly appropriate candidate for utilization of lotteries in the initial licensing process. Using lotteries is virtually the only method by which the Commission can process expeditiously the 12,000 LPTV applications currently on file, and the thousands more that will be submitted as pending applications are placed on "cut-off" lists. Without lottery processing, initiation of this new broadcast service will be delayed for many years, precluding the expansion of the diversity of broadcast voices that introduction of LPTV can achieve.

19. In the LPTV *Report and Order*, at para. 80, the Commission concluded after a thorough review of the issues that the only traditional comparative criteria to be considered in the LPTV context would be diversity and minority ownership. We found that the other criteria normally considered in full service comparative hearings were not relevant to the intital licensing process in this new, minimally-regulated secondary service. Finally, we viewed use of the comparative process as the "second best" option, to be engaged in only until a system of random selection could be instituted.[5]

20. The factors that the Commission had determined were relevant in comparative considerations in LPTV—diversity and minority ownership—also have been designated by Congress as deserving of special preferences in licensing proceedings conducted by lottery. Commenters Henry Geller and Donna Lampert ("Geller/Lampert") suggest that the public interest would be best served by adoption of a "middle ground" approach to LPTV licensing. Under this approach, the Commission, applying standards similar to traditional comparative criteria, would "take an initial 'hard look'" at mutually exclusive applications and see whether it is possible and desirable to make an immediate public interest judgment on them—for example, to grant one and deny the others, or to exclude from the lottery one or several and then to hold the lottery among the remaining applicants. A similar scheme is suggested by Community Television Network, Inc. ("CTN"). It argues that the Commission should use a paper hearing process adopted in the LPTV *Report and Order* to separate proceedings in which there is a "clear winner" under traditional comparative criteria from those situations in

[5] *Low Power Television Broadcasting*, 47 Fed. Reg. 21468 (May 18, 1982), at paras. 21–22.

which there is "considerable doubt" as to the ultimate winner. We have rejected these alternatives. The minimal public interest benefit that might be obtained from use of the Geller/Lampert approach or the CTN scheme does not outweigh the substantial detriment inherent in use of either option. Both plans involve devoting the resources of the Commission and the parties to consideration of issues that we and the Congress have found to to be largely extraneous to the LPTV licensing process. The result would be additional delay in introduction of service, and additional cost to the parties, without a meaningful public interest gain.

21. Therefore, after full consideration of the analytic factors identified in the *Conference Report*, and having considered the record developed herein, the Commission finds that the public interest would be served by implementation of a random selection system for initial LPTV licensing. However, we acknowledge that at some future time circumstances may have so changed that use of a lottery to process low power applications would no longer be appropriate.

22. *Lotteries as Tiebreakers in Mass Media Comparative Proceedings.* In the *Notice*, the Commission proposed to use lotteries in mass media services other then LPTV "on an *ad hoc* basis in those instances where the qualifications of competing applicants are so close that no material difference between the parties' ability to serve the public interest can be distinguished." Numerous commenters opposed this proposal, contending that inadequate legal authority exists to conduct *ad hoc* lotteries; the *Conference Report* discourages such use; lotteries were intended to be a substitute, not a supplement, for comparative hearings; and sufficient guidance regarding services and standards was not provided. We have analyzed the arguments that have been raised and conclude that the language of both the statute and the *Conference Report* permits the use of *ad hoc* lotteries in "tied" cases. It does appear, however, that the process by which we might identify such instances, and the particulars of the procedure we would utilize in such cases deserve greater consideration than was given in or generated in response to our *Notice* proposal. We have therefore decided not to implement that proposal at this time.

23. *LPTV Applications Subject to Lottery.* Some parties assert that LPTV licensing proceedings cannot be conducted by lottery as to applications already pending because of inadequate notice to applicants as to procedures and preferences. These claims are without merit. We observed in the LPTV *NPRM*, at 78, that we would not process mutually exclusive applications through to grant until comparative criteria and procedures were finally established. *Low Power Television Broadcasting*, 82 FCC 2d 47, 78 (1980). Any grants made during the conduct of that rule making proceeding,

including permits to construct conventional translators, were conditioned on its outcome.[6] Additionally, we proposed in the LPTV *NPRM*, at 75, that if a winning applicant could not be selected through paper hearing on the basis of proposed comparative preferences, "the case would be referred for lottery," with each party to have an equal chance of receiving the authorization. Thus, it has been clear since the commencement of the LPTV rule making proceeding that lotteries might be implemented in LPTV licensing, and that applicants proceeded at their own risk as to the criteria by which their applications might finally be processed.

24. While we did not implement the lottery authority as initially enacted in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, we made clear in the LPTV *Report and Order*, at para. 65, that "it remains our intention to utilize a random selection process when and if that becomes practicable." Applicants were placed on notice that "their applications, if mutually exclusive with other applications, may be subject to revised processing procedures, standards and qualifications in connection with implementation of a system of random selection." *Id.* Because a number of timely-filed petitions for reconsideration of the LPTV *Report and Order* were subsequently submitted, applicants have been on notice that the rules and processes adopted in the *Report and Order* remain subject to modification by the Commission if proper cause is found.

25. In Pub. L. No. 97–259, Congress amended the lottery authority it earlier granted. Subsequently, the Commission issued the *Notice* presently under consideration. Although the diversity and minority preferences adopted by Congress for lottery use will differ somewhat in application from the preferences we had initially contemplated using in LPTV comparative hearings, they reflect similar concerns and are directed to similar objectives. Further, since no cases have been designated for hearing under the procedures initially adopted in the LPTV *Report and Order*, all applicants in contested LPTV cases will be judged by exactly the same standards, regardless of their filing date. In light of all these factors, we do not believe that any LPTV applicant can fairly claim to have been harmed by our determination to apply the lottery scheme adopted herein to pending LPTV applications.

26. *LPTV Processing Framework.* In the *Notice*, we proposed a comprehensive processing blueprint for mass media applications subject to lottery, contemplating that these procedures would initially be applied in LPTV. Under the initial filing procedures, described in para. 16 of the *Notice*, after an application is tendered and found acceptable for filing, it will be listed in a Public Notice

[6] In *Interim Processing Procedures*, 45 Fed. Reg. 62004, (September 17, 1980), we reaffirmed this action.

(the "A" list) inviting competing applications until the specified cut-off date approximately thirty to sixty days later.[7] Applications filed after that date will not be eligible for consideration or grant as part of that particular proceeding.[7A] All competing applications found acceptable for filing will be included in a subsequent Public Notice (the "B" cut-off list), which will also announce the date on which the lottery will be conducted. Additionally, that list will show the preferences for which the applicants have certified that they are eligible, and their selection probabilities. Applicants will be obliged to bring any clerical or mathematical errors in the selection probabilities to the Commission's attention immediately. The lottery will then be conducted and the "tentative selectee" named in a Public Notice providing an opportunity for filing of Petitions to Deny.

27. The proposed use of "A" and "B" cut-off lists described above is similar to present practices in the Mass Media services.[8] This aspect of our proposal was essentially noncontroversial, but for an expression of concern by NLMC that the cut-off period "be long enough to permit a reasonable opportunity for resubmission of applications rejected by FCC staff." The Commission notes that Section 73.3572(c) of the Rules presently sets the time for filing of mutually exclusive applications at a date "not less than 30 days" after release of the "A" list Public Notice. Our experience is that the thirty-day period allows sufficient time for the filing of competing applications.

28. We believe that the system we have described, utilizing "A" and "B" lists, will be a satisfactory method by which to commence processing of applications, and will adopt that procedure, with one minor modification. We observe that our initial proposal did not specify what notice, if any, would be given of changes in selection probabilities necessitated by corrections submitted in response to the "B" list. We conclude that a corrected "B" list should issue, indicating both the changes in selection probabilities and any change in the lottery date.[9] [10]

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[7] Under the procedures being adopted, all pending mutually exclusive applications will be named in the "A" list, and will be served with copies of that list.

[7A] Prior to the adoption of the June 17, 1982, LPTV Rules, engineering judgment was used to prescreen applications for cut-off lists. Since promulgation of the new rules a contour overlap standard has been used in screening applications for such cut-off lists. As a result of using the engineering judgment method, some applicants previously cut-off are mutually exclusive with those that have been assigned later cut-off dates. In order to avoid prejudice to any applicant because of changes in the screening process, all mutually exclusive applications filed prior to the later cut-off date will be considered in a consolidated lottery.

[8] *See* Section 73.3572 of the Commission's Rules.

[9] No lottery will be held less than thirty days following release of a "B" list. This period will permit negotiation of settlement agreements. Additionally, parties who may have erroneously been omitted from the "B" list will have the opportunity to

29. We will also adopt the process we had initially set forth in para. 21 of the *Notice* for actual lottery selection. Applicants will be assigned a portion of the numerical spectrum between .000 and .999 in accordance with their selection probabilities. Although we contemplate that, for ease and consistency of processing, numerical spectrum will normally be allocated in the order in which applications joined in a given lottery group were accepted and given a file number, no applicant has anything in the nature of a "right" to any part of the numerical spectrum. The portion of numerical spectrum allocated to each applicant will be announced at the time the lottery is to be conducted.

30. A random number in the range of .000 to .999 will be generated in a lottery selection session. It is our expectation that mass media lotteries will be conducted on a limited number of specified dates each month. As we proposed in the *Notice*, at para. 22, Public Notice of all drawings will be given no less than seven days in advance. This Notice will normally be given on the "B" list, but may be modified if necessary.[11]

31. *Petitions to Deny.* In the first *Report and Order* in this

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so inform the Commission during that period. Later appeals on this issue will not be entertained. Applications which are not mutually exclusive with others will not appear on a "B" list, but only on a proposed grant list which will provide for filing of Petitions to Deny within a fifteen day period.

[10] Placement of the name of an applicant on an "A" list will require the filing by the cut-off date of the applications of those who wish their applications to be considered with that application or with any other application on file by the cut-off date which involves a conflict necessitating being joined in a lottery with that application (or any other application on the list). This is similar to the practice followed in AM and noncommercial FM broadcasting, which are also services in which licensing is done on a noninterference demand basis. *See Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153 (1967), *recon. denied*, 10 FCC 2d 160 (1967), *appeal dismissed, Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968). *But see*, as to full service television and commercial FM, *Sterling Recreation Organization Co.*, 80 FCC 2d 319 (1980), *recon. denied*, 86 FCC 2d 804 (1981). This process may in some cases require that those interested in securing construction permits for Tier II or Tier III locations file against Tier I applications on "A" lists or against other applications filed in response to or otherwise in conflict with those applications. Those interested in applying for stations in Tiers II or III should be aware that they may be precluded from doing so if they do not stay alert to ongoing processing and submit competing applications within prescribed time periods.

[11] The system for selecting the random numbers will be available for public review and inspection. Additional details regarding the mechanics of the lottery selection process will be included in a "lottery processing manual" which we expect to release prior to the date of the first lottery. In Appendix B of the *Notice*, we proposed in Section 1.1623(a) to compute probabilities to three significant digits. Having reviewed this matter, we now believe that use of three significant digits will be sufficient in lotteries with no more than twenty applicants. However, four significant digits should be used with larger lottery groups in order to provide a sufficient degree of precision with respect to probabilities. To accomodate this procedure, the rule as adopted will require computation to "no less than" three significant digits. Probabilities will be truncated to the number of significant digits used in a particular lottery. For example, a probability of .2347 in a three digit lottery would be truncated to .234. This approach will not

proceeding, 89 F.C.C. 2d 257 (1982), we observed, at 277–79, that a fundamental difficulty inherent in our Section 309(i) lottery authority as initially enacted was the requirement that the qualifications of all applicants under Section 308(b) and Section 309(a) be determined prior to lottery selection. Our amended lottery authority provides that determinations under Section 308(b) and 309(a) need be made only as to the applicant who has been selected by lottery. The Conferees note that "[i]t is only at this latter, post-lottery stage that Petitions to Deny the application need be considered and that the right to a hearing may arise."

32. We continue to believe that in the LPTV context, where expedition is an overriding public interest factor, the public interest will best be served if we consider Petitions to Deny only against the "tentative selectee". However, we are also sympathetic to the concerns of those commenters who believe that allowing the filing of post-lottery petitions may encourage submission of essentially frivolous pleadings which would not be the case if pre-lottery filing were required. Thus, we are adopting two alternative petition processes. As to any given lottery group, the method to be used will be announced no later than the "B" list release date. Experience should indicate which system will best advance our purposes.

33. One petition approach, as proposed in the *Notice*, will be to invite Petitions to Deny after a "tentative selectee" is chosen by lottery. The second method will require a notice of Petition to Deny to be filed no more than 30 days after publication of the "B" list. Under this second approach, ordinarily only those parties who preserved their rights by filing a notice of Petition to Deny will be allowed to participate in the formal post-lottery Petition to Deny process. Additionally, however, the Commission will consider for good cause shown[12] Petitions to Deny by other parties who did not file the preliminary notice of Petition to Deny. *See* paras. 40–42 *infra*.

34. The law firm of Daly, Joyce and Borsari ("DJB") contends that by allowing petitions to be filed only against the "tentative selectee," the Commission is essentially nullifying the petition rights provided by Section 309(d)(1). That section allows the submission of petitions designed to show that grant of a license or permit to a particular applicant would be inconsistent with the public interest requirements of Section 309(a). However, Section 309(i) states that in a lottery situation those findings only need be made with regard to

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substantially disadvantage any applicant and will prevent the occurrence of the problem related to use of a rounding procedure, in which the sum of all applicant probabilities might be greater than 1.000.

[12] "Good cause" includes newly discovered evidence, evidence that could not be discovered before with diligence, and fraud or suppression of evidence by the "tentative selectee." The Commission will adopt a strict standard with regard to "good cause" Petitions to Deny.

the "tentative selectee." Therefore, consideration of petitions against other applicants would have no purpose.

35. It shall be our practice to issue a post-lottery Public Notice identifying the "tentative selectee." A period of fifteen days from issuance of the Public Notice will be provided for the filing of Petitions to Deny. Notice of proposed grant will also be given, and fifteen days provided for filing petitions, with regard to those uncontested applications not subject to lottery.[13] If no petitions are filed against the "tentative selectee," the staff will review the application to determine whether the applicant is fully qualified. If so, a construction permit will be granted. If not, a hearing designation order will issue.

36. We believe it appropriate to provide the "tentative selectee" fifteen days from the date on which petitions are due for the filing of an opposition. Replies by petitioners will not be allowed. Although we had initially proposed twenty day periods for oppositions and replies, the limited number and scope of issues involved indicate that shorter periods will provide adequate time for preparation and submission of the relevant pleadings and that replies are unnecessary.

37. *Two Step Petition to Deny Process.* There will be a two-page limit on the notice of Petition to Deny. The Notice will be filed with the Commission and served upon the applicant against which it is directed within 30 days after publication of the "B" list. Responses to the notice will not be entertained. The notice will make specific allegations that concisely state and explain with particularity the reasons why the applicant lacks qualifications or why a grant of the application would *prima facie* be inconsistent with the public interest. *See, e.g.*, Fed. R. Civ. P. 8. The purpose of the notice is to inform applicants and the Commission of petitioner's contentions; subsequent post-lottery procedures will allow full ventilation of the issues.

38. It is expected that only legitimate and truthful issues will be raised in the notice of Petition process. The notice will be subscribed to and certified by the petitioner and signed by his representative, if any.[14] Moreover, untruthful statements or intentional misrepresen-

[13] We reject the proposal of the National Latino Media Coalition ("NLMC") that the "tentative selectee" be required to publish local notice of its status. We believe that the notice that an application has been filed, which is required, is sufficient to inform interested persons in the community of the applicant's activities before the Commission. This is the same process that is followed with regard to regular broadcast applications. We see no need to impose heavier burdens on applicants in this secondary service.

[14] A suggested certification form follows:

STATE OF . . . . . .

COUNTY OF . . . . . .

tations in one proceeding could be the subject of inquiry in other proceedings as well.[15]

39. In the two-step approach, the formal Petition to Deny process will begin after a "tentative selectee" is chosen by lottery. When the Public Notice announcing the "tentative selectee" is issued, petitioners will have the opportunity to detail their objections to the apparent winner's qualifications in a formal Petition to Deny. Only those parties that preserved their right to object by filing a notice of Petition to Deny may participate in the post lottery proceedings, absent a good cause showing. *See* n. 10, *supra*. The formal Petition to Deny will be limited strictly to only those issues raised in the initial notice of Petition to Deny. Petitioners will have fifteen days after the Public Notice announcing the "tentative selectee" to present their case in chief. The "tentative selectee" will have fifteen days to respond.

40. In providing alternative approaches for handling Petitions to Deny in low power television lottery proceedings, we are taking a different approach than that to be applied to similar filings in the Common Carrier and Private Radio Services that will be subject to lotteries. As explained in paras. 103–105 and 126 *infra*, in the latter services Petitions to Deny and other objections must be filed before the actual lottery. Pre-lottery filing of Petitions to Deny in these services will result in the most efficient conduct of these proceedings. With regard to the low power television lotteries, however, other considerations not material to the non-mass media lotteries recommend the advisability of the alternative two-step Petition to Deny process. Specifically, the sheer number of applications involved as well as the nature of the issues that could be raised in low power proceedings, including those arising from the preference system, suggests that it would economize the efforts of interested parties to

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Jane Z. Doe hereby certifies and states that she resides at _____ ; that she is the petitioner herein; and that she has read the foregoing petition and knows the contents thereof and that the same are true of her personal knowledge.

/s/

Jane Z. Doe

[15] Frivolous, fraudulent or false allegations will be viewed with extreme disfavor. Intentional and material misstatements could lead to prosecution by the Justice Department under 18 U.S.C. § 1001 which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, or fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

defer the preparation and filing of full Petitions to Deny until after the lottery. In this regard, we are particularly aware that participation by individuals, informal citizens' groups, and nonprofit organizations is likely to be much more common in low power lottery proceedings than in Common Carrier or Private Radio proceedings. Deferred filing of full Petitions to Deny will enable such individuals and groups to utilize their limited resources more efficiently and effectively. We will, of course, closely monitor the workings of the mass media and non-mass media Petition to Deny procedures. Should it become apparent that the public interest would be better served by revisiting any of the procedures adopted herein, we will not hesitate to make the necessary changes.

41. *Qualifications of "Tentative Selectee."* We note that we will only consider the merits of petitions that concern the qualifications of the "tentative selectee." We have considered the comments of such parties as Spanish International Network ("SIN") and CTN arguing that challenges to the preference claims of all applicants must be considered before a lottery is conducted. We have determined that we will not consider such issues pre-lottery, and that they will generally only be in order against the "tentative selectee" post-lottery. To consider all such claims against applicants other than the "tentative selectee" potentially could mire lotteries in pleadings equal in volume and complexity of disposition to those associated with traditional comparative hearings, with no corollary public interest benefit. In most instances, improper preference claims would affect the selection probabilities of all other applicants proportionately.

42. However, we have determined that in cases in which the provision of the Rules (Section 1.1623) requiring computation of a minimum forty per cent diversity preference is used, all other applicants are not equally disadvantaged by an improper diversity claim. Therefore, to make certain that all applicants are treated equitably, we will entertain post-lottery challenges to the diversity status of applicants benefiting from the minimum diversity preference provision. We will announce, at the time of release of a "B" list, whether the minimum diversity preference was applied. The post-lottery filing deadlines for "objections to diversity claim", and objections thereto, will be the same as those adopted for Petitions to Deny. No other claims regarding preferences will be considered as to any applicant other than the "tentative selectee."[16]

[16] Due to the early difficulties experienced by the Commission in establishing its LPTV recordkeeping system, we are concerned that some Petitions and informal objections previously submitted may not have been associated with the correct applications file. Additionally, many of the matters raised in pending Petitions have been rendered moot by actions taken in this *Report and Order* and in the *LPTV Reconsideration Order*, FCC 83–129, also adopted this date. Therefore, we have determined that in order to provide equitable and expeditious treatment to all parties, all Petitions to Deny and informal objections now on file against

43. All applicants should be aware that improper preference claims violate Federal law. 18 U.S.C. § 1001. Additionally, evidence of such claims could place in jeopardy all Commission authorizations then held by the wrongdoer, as well as adversely affecting the grant of any further authorizations.

44. *Hearing Procedures: Paper and Oral.* As observed in the *Notice*, we believe that we may be able to abbreviate the time consumed by the administrative process through the use of a modified paper proceeding directly administered by the Commission. In paper proceedings, the Commission *en banc* or one or more Commissioners will receive the evidence and issue the decision awarding construction permits to applicants.[16A] The Mass Media Bureau will serve as advisor to the Commission in the paper proceeding process.[17] As such, the Bureau will be responsible for reviewing and analyzing pleadings, and preparing a draft of the decision.[18]

45. The Commission will issue a *Memorandum Opinion and Order* disposing of any allegations presented in Petitions to Deny which do not raise substantial and material questions of fact. This document will also specify any remaining issues for either a paper or oral hearing. If Petitions to Deny do not raise new or novel issues, action upon them may be taken by delegated authority, and similiarly, Designation Orders may be issued by delegated authority. The Designation Order will specify the procedures for a paper hearing, set forth the pleading schedule to be followed by the parties, specify the party with the burden of proceeding and order any petitioner who directly raises an issue specified in the order to participate as a party.

46. In the case of a paper hearing, the Designation Order will direct the applicant or the party with the burden of proceeding to submit its direct case in writing on or before the date set in the

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LPTV applicants will be considered dismissed. Parties may wish to refile Petitions and file notices in accordance with the procedures outlined herein.

[16A] The flexibility for an individual Commissioner or panels of Commissioners to rule on such matters is provided in Section 5(d)(1) of the Communications Act and Section 566(b) of the Administrative Procedure Act. We will in future actions determine the circumstances under which such decisionmaking will be delegated.

[17] In the event that the Mass Media Bureau may be required to perform any investigative or prosecutorial functions prior to designation in a particular proceeding, such tasks shall be conducted by separated Bureau personnel who will not include or be subject to the direct supervision of the Bureau personnel who advise the Commission in the adjudication of proceedings. *See* 5 U.S.C. § 554. In addition, Bureau personnel who authorize, directly supervise or direct investigative or prosecutorial functions will not participate or advise in the Commission's adjudicative decisions. The taking of oral evidence will not be delegated to Commission employees other than Administrative Law Judges.

[18] Of course, the Bureau personnel who participate as a party through a separated trial staff will not advise the Commission regarding any aspect of that case.

Order. This will be approximately 30 days from the date of the Order. The direct written case must set forth all the facts and circumstances related to the issues in the Designation Order. Documentary evidence upon which the applicant or the party relies must be attached in exhibit form. Each exhibit must be numbered, paginated and accompanied by a certification by a person or persons with personal knowledge of the facts therein. The Designation Order will also specify that the other parties may submit a written rebuttal case within twenty days after the direct case is due. As with the direct case, documentary evidence submitted with the rebuttal case must be placed in a numbered exhibit and accompanied by an appropriate certification by a person or persons with personal knowledge of the facts recited therein.

47. Within ten days after the rebuttal case is due, any party to a paper proceeding also may submit a request for oral hearings and cross examination, stating the subject matter of the desired oral presentation or cross-examination and the basis for it. Included therein shall be the evidence to be presented, the reason why the evidence is material to the outcome of the proceeding, the reason why an oral presentation or cross-examination is necessary to bring out this evidence, and the evidence in the record which would be contradicted by the cross-examination or oral presentation. In sum, the moving party must demonstrate that an oral hearing is required for a full and true disclosure of the facts in issue. Finally, the Designation Order will specify a date for the submission of proposed findings of fact and conclusions of law that conform with Section 1.264 of our Rules, requests for the admission of facts and genuineness of documents in accordance with Section 1.246, written objections to the admission of proffered evidence and requests for deposition allowed by Section 409(h) of the Communications Act. In paper proceedings, the Commission *en banc* or one or more Commissioners will issue subpoenas, rule upon questions of evidence, require the filing of memoranda of law upon any issue which the Commission is required to rule upon during the course of the hearing, dispose of routine procedural requests, act on motions to enlarge or modify issues, and take actions and enter procedural orders in conformance with the Administrative Procedure Act.

48. The Commission intends to dispose of as many post-lottery hearings as possible pursuant to the paper procedures described above. When reviewing each case, the Commission also will consider any requests for oral hearings.[19] However, as we had determined in the LPTV *Report and Order*, *supra*, at para. 71, we will order oral hearings only in limited circumstances, *i.e.*, where it is shown that the party will be prejudiced by a paper proceeding without oral

[19] However, as we have noted in Paragraph 45, the Commission may in the first instance on its own motion designate a matter for oral rather than paper hearing.

testimony, where a substantial and material question of fact which would affect the outcome cannot be resolved without oral testimony or where oral testimony would otherwise be required by the public interest. If the Commission makes a decision on the basis of the written affirmative and rebuttal cases and any other authorized pleadings, the request for oral testimony will be deemed denied, but reasons for the action will be articulated.[20]

49. *Disposition of Competing Applications.* Due to the virtually simultaneous filing of thousands of LPTV applications, we are in some cases faced with the need to process "daisy chains" consisting of numerous applications interconnected by their mutual exclusivity. We will not take further action on other applications in the chain until the status of the "tentative selectee" is finalized. Thus, a Petition to Deny the grant to the "tentative selectee" would freeze the status of all other applications in that lottery group. If the "tentative selectee" is found qualified, remaining applications will be processed as appropriate. That is, those applications which are no longer mutually exclusive with others will be placed on a proposed grant list allowing for filing of Petitions to Deny, groups of mutually exclusive applicants will be designated for lottery, and applications which are not grantable due to their mutual exclusivity with the selectee will be dismissed. If the "tentative selectee" is found unqualified, all remaining applicants will participate in a lottery, unless the elimination of the application of the "tentative selectee" has broken the mutual exclusivity of the applicants. In that case, the applications shall be broken into groups, and the lotteries conducted. In either situation, the process will be repeated until all applications have been disposed of.

50. *Acceptability Standard for LPTV Applications.* We reaffirm our decision in the LPTV *Report and Order*, at para. 51, that an

[20] If the Commission concludes that an oral proceeding is necessary, it will issue a Designation Order or an interlocutory order referring the proceeding to the Chief Administrative Law Judge for hearing on the unresolved issue or issues. The Chief Administrative Law Judge will assign an Administrative Law Judge to preside over the hearing and set a prehearing conference to establish a discovery and trial schedule. The Mass Media Bureau will be made a party to the proceeding. The Presiding Judge may request proposed findings of fact and conclusions of law to be filed within thirty days after the record is closed. The Presiding Judge shall conduct the hearing, make all evidentiary rulings, and issue an Initial Decision. *See* Sections 1.201 *et seq.* and, particularly, Section 1.243. All appeals, taken by exceptions to the Initial Decision, will go directly to the Commission. The Adjudication Division of the General Counsel's Office will serve as an advisor to the Commission in such appeals. Our action herein constitutes the determination required under Section 0.365 of the Rules that Initial Decisions will not be appealed to the Review Board. The Commission, after consideration of a written appeal, and oral argument if necessary, shall determine whether the "tentative selectee" is qualified. If so, a grant shall issue. If not, another lottery shall be held from among the remaining applicants in the initial lottery group. If the Initial Decision is not appealed, either a grant will issue or a new lottery will be held subsequent to this action.

LPTV application must be "complete and sufficient" in order to be acceptable for filing. The Conference Report calls for use of the "substantially complete" acceptance standard set forth in *James River Broadcasting Corp. v. FCC*, 399 F.2d 581 (D.C. Cir. 1968), unless another standard has been established by rule. The LPTV standard has been so established. It differs from the "substantially complete" requirement in that applications which are incomplete or have blatant defects are summarily returned.[21]

51. *LPTV Application Form.* The preference system being adopted in this *Report and Order* requires the submission of additional information on ownership characteristics and various other certifications by those who have already filed LPTV applications. Form 346, the application for LPTV construction permits, is being amended to reflect the new information requirements. *See* Appendix D. When an application now on file is placed on an "A" cut-off list, the applicant will be permitted to amend to provide only the newly required information, as requested on the new Form 346, until the "A" cut-off date.[22] New mutually exclusive applications filed in response to the "A" list will be required to comply with all rules and policies in effect, as reflected in the new form.[23] In those instances where an "A" list has already been issued, mutually exclusive applications have been filed in response, and the cut-off date has passed prior to the effective date of this *Report and Order*, the Commission will release a "B" list, allow all applicants on that list thirty days to amend with the additional information, and then issue a corrected "B" list indicating preferences to be applied and setting a lottery date.

52. The Commission's application forms currently require the submission of information that, in the ordinary case, is sufficient for the Commission to be able to determine that an applicant is qualified under Section 308(b). The Commission previously has found that it is in the public interest to acquire much of this type of information by certification.[24] The Commission staff has had, and retains, the ability to inquire of applicants if additional information is necessary to resolve matters at issue. To require that all applicants submit the

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[21] Applications which are later refiled will be treated in accordance with the practices described in the *LPTV Report and Order*, para. 51.

[22] Applications which are not amended with the requisite information will be dismissed. In the future, we will further revise the format of Form 346 to facilitate computerized processing.

[23] In some situations, the filing of new applications against the "A" list will cause additional pending applications to be joined in mutually exclusive status. The Commission will notify those applicants of this occurrence and they will be given thirty days to amend with the newly required information, prior to release of the "B" list for their lottery group.

[24] *See, e.g., Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 R.R. 2d 381 (1981).

specific factual information underlying their certifications, as proposed by such parties as Youth News, would impose a mammoth paperwork burden upon applicants and the Commission, without balancing public interest benefit. Applicants who submit false information will, as we have indicated above with regard to preference claims, be subject to substantial penalties.

53. *Multiple Applications.* We concur in the views of such parties as Local Power Television, Inc. ("LPTI") and International Broadcasting Network ("IBN") regarding the need for Commission clarification of the manner in which multiple applications for the same facilities by applicants with some common interests will be treated. It appears that some applicants have filed identical or substantially identical multiple applications, perhaps for the purpose of improving the chances of winning in a specific lottery. Permitting such "stuffing of the ballot box" would seriously jeopardize the integrity of the Commission's processes. Additionally, allowing such actions might effectively nullify the program of diversity and minority preferences mandated by Congress.

54. We are therefore adopting a strict multiple application rule, that bars the filing of any application for a new station, or for major changes in an existing station, that would be "directly mutually exclusive" with any pending application filed by the same applicant or by any applicant in which any party common to both applications is an officer, director, or has any interest, direct or indirect.[25] The phrase "directly mutually exclusive" takes into account the possibilities inherent in a "daisy chain," a long or otherwise complex series of applications that are connected by their mutual exclusivity for a particular lottery or lotteries. For example, an applicant may file several applications specifying the same channel but different, non-overlapping, though geographically nearby, coverage areas. While these applications may be involved in the same lottery because each is mutually exclusive with other applications that link them together, they would not be "directly mutually exclusive" because the facilities that each specifies do not conflict with one another. Theoretically, each could be granted. Conversely, those applications filed by the same applicant specifying facilities which, by themselves, would be mutually exclusive with each other, are barred.[26]

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[25] However, the proposed 1% benchmark for cognizable ownership interests will apply.

[26] Two low power television or television translator construction permit applications will be considered mutually exclusive whenever the facilities associated with one of the applications would cause interference within the protected signal contour of the other as defined in the low power television rules (47 C.F.R. § 74.707). Applicants that are unsuccessful in the lottery and whose facilities would not cause interference to those of other co-pending applications, including those of the lottery winner, may also receive a construction permit. Such permits will be accompanied by a notification that the permittee may expect to receive

Those who have filed applications that violate this rule should withdraw such applications no later than thirty days following the effective date of this *Report and Order*.[27] Our revised LPTV construction permit application includes a certification of compliance with this requirement. Existing applicants will be obliged to make this certification at the time relevant applications are covered by an "A" cut off list or when they are otherwise notified of the need to amend.

55. *Real Party in Interest Certification*. In the *Notice*, at para. 30, the Commission proposed (consistent with the *Conference Report*, at 45–46), that all applicants in the Mass Media services certify, as part of their application for any service in which random selection may be used, "that the applicant is the real party in interest and that no agreement, either explicit or implicit, has been made to transfer or assign the license at a later date to any other party."[28] We suggested that this certification be added to Form 346 for LPTV applicants, and that it be appended to applications in other relevant services. At this time, we shall adopt this noncontroversial proposal for the LPTV service only. As to existing LPTV applicants, we shall require that they complete this certification at the time they are covered by an "A" cut off list or otherwise notified of the need to amend.

56. *License Holding Period*. NLMC asserts that the certification only will be sufficient to inhibit abuse of the minority and diversity preferences in LPTV if the recently-abolished three year anti-trafficking rule is applied to LPTV proceedings. However, we continue to be of the view, as we observed in para. 31 of the *Notice*, that application of a one year holding period, as adopted in the LPTV *Report and Order*, will be sufficient to preclude the "rapid re-assignment or transfer of stations, construction permits, or licenses granted by lottery" that the Conferees believe would undermine the intent of the preference scheme. In the *Report and Order* deleting the "three-year rule" and the underlying "trafficking" policy, we adopted a one year holding period in situations in which the permit

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interference from the facilities of the lottery winners. If permittees deem such interference intolerable, the construction permit shall be surrendered to the Commission within 30 days of the grant date.

[27] Should such applications not be withdrawn, it is the Commission's intent, in the course of processing, to retain the application filed first in time and dismiss all other applications conflicting with this rule.

[28] Although the *Conference Report*, at 46, mandates that this certification only be required from the new permit grantee, we proposed that it be included in all applications and completed when filed. No comments contrary to this approach appear to have been received. We believe that both to safeguard the Commission's processes, and to facilitate applications processing, it would be appropriate to adopt the proposal as made.

to construct a new facility resulted from a hearing grant made on the basis of comparative criteria.[29] Both the holding period adopted in the *LPTV Report and Order* and the period established in our proceeding eliminating the "three-year rule" apply only in cases where the construction permit was awarded by virtue of a comparative preference. We believe that continuing this procedure in the lottery context is consistent with the intent of Congress that a holding period be imposed to protect the integrity of the lottery preference scheme. Thus, the one year post-lottery holding period will apply only when the permit holder was the beneficiary of a diversity or minority preference. The one year period begins with initiation of on-air operation. The rules will be amended to reflect this decision.

57. *Changes in Preference Eligibility.* We also shall adopt the proposal in para. 32 of the *Notice* requiring that an applicant inform the Commission of changes in preference status within seven days of the completion of any such changes, up until publication of a "B" list on which the applicant appears, or, as to unopposed applications, the proposed grant list. Changes in diversity status for subsequent lotteries would be reported after the construction permit is granted. This treatment in some cases may result in an applicant receiving an extra diversity preference in a lottery held subsequent to a tentative selection which has not been processed through to grant. However, we are of the view that it is a reasonable method by which to modify the status of LPTV applicants while limiting the delay entailed by such a requirement.

58. Thus, if an applicant is a "tentative selectee" and a petition has been filed against the grant of the application, the "tentative selectee" status will not affect the diversity preference to which that applicant may be entitled in a subsequent proceeding. However, any subsequent grant will be conditioned on the outcome of the first proceeding. Further, the grant in the second proceeding, and all further grants, will be included for purposes of adjusting the diversity preference in subsequent proceedings. We believe this process represents an equitable compromise. While applicants remain under a continuing obligation to make certain that the information on file is correct, amendments will not improve the preference standing of any applicant once that applicant appears on the "B" cut-off list.

59. *Preference Framework for Mass Media Services.* As we have indicated, substantial attention was drawn to the preference scheme that the Commission proposed at paras. 35–44 of the *Notice*, and the related rule proposals set forth as Sections 1.1621–1.1623 in Appen-

[29] *Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control)*, 47 Fed. Reg. 55924 (December 14, 1982).

dix B of the *Notice*. The proposals made track the *Conference Report* accompanying the amendatory language of the statute. Having fully considered all of the comments submitted regarding the various aspects of the preference scheme, we adopt the preferences generally as proposed, but with a number of clarifying and perfecting modifications.

60. Initially, we find that the minority preferences enacted by Congress are constitutional under the holdings of the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). As we observed in the first *Notice* in this proceeding, 88 F.C.C. 2d at 491, those cases make clear that the award of special preference to remedy the effects of past discrimination does not offend the equal protection component or the due process clause of the Fifth Amendment.[30] We noted that although a remedial preference scheme "may result in grants of licenses of minority applicants which might otherwise have gone to others," under *Fullilove* that result is an appropriate consequence of the remedial preference. We remarked that the medical school admissions program overturned in *Bakke* set aside a specific number of places for minorities, utilized a different admissions standard for minorities than for whites, and did not involve any finding of past discrimination by an appropriate governmental body.

61. The program adopted herein does not share the attributes of the scheme rejected in *Bakke*, and comports with the teachings of *Fullilove*. The Conferees have, at 43–44 of the *Report*, found that past discrimination has resulted in severe underrepresentation of minorities in media ownership. They have therefore established a program in which race is one of two factors to be awarded fixed relative preferences.[31] As SIN correctly points out, a 2:1 fixed relative preference does not guarantee that minorities will receive double the number of licenses as would non-minority applicants. Further, the Conferees have instructed that we report annually on the effect of the preference system and whether it is serving the purposes intended. Congress will be able to further tailor the program based on that information, and may eliminate the preferences when appropriate. All of these factors lead to the conclusion that the preference system as adopted passes constitutional muster.[32]

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[30] The process of analysis under the equal protection component of the due process clause of the Fifth Amendment, applicable to the Federal government, is essentially the same as that conducted under the equal protection clause of the Fourteenth Amendment.

[31] In fact, the diversity preference has an intermediate "floor" for each lottery that is not applied to the minority preference.

[32] This conclusion is buttressed by the recent judicial action rejecting a challenge of Commission use of minority ownership status as one of the acceptance criteria for applications to use frequencies made available by our clear channel rule making

62. The proposed rules contained in Appendix B of the *Notice* represent the preference scheme described in the *Conference Report.* The Conferees stated, at 44, that the minority ownership preference "must be no less than a fixed relative preference of 2:1." Members of different minority groups are to "be allowed to aggregate their ownership interests to achieve a majority interest in any given application." The contention of a number of parties that a 2:1 fixed relative preference is not "significant" within the meaning of the statute is contradicted by the findings of the Conferees that such a preference fulfills the "significance" test. Further, the alternative preferences proposed by Frontier Broadcasting Companies ("Frontier") and others are so exclusionary in nature as to be constitutionally suspect. If the "dilution effect" complained of by some parties appears with experience to be detrimental to achieving the result intended, the Congress or the Commission may wish to revisit this area. We believe, however, that the minority preference designated in the *Conference Report* should first be applied for a reasonable period.

63. The diversity preferences in the proposed rules of the *Notice's* Appendix "B" reflect the *Conference Report's* multilevel approach to the diversity issue. There is proposed a 2:1 fixed relative preference for those with no other mass media ownership interests, a 1.5:1 preference for those holding interests in one, two or three properties, no preference for those with more than three interests, and no preference for those with media properties that essentially would be co-located with the proposed new station. A number of commenters object to this scheme because it does not take account of the details of media ownership, failing, for example, to distinguish between a major market VHF station and a low power station. Upon review of the *Conference Report* and the comments of the parties, we have determined to reject the modifications suggested by the commenting parties.

64. In taking this action, we agree with the view expressed by SIN that "should the Commission have to expend substantial resources to investigate and resolve such subjective issues . . .it might as well hold a traditional comparative hearing." SIN correctly notes that the premise of the lottery proposal is that in the secondary, basically unregulated LPTV service, "most distinctions between applicants are not significant enough to warrant detailed Commission inquiry."[33]

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proceeding. *Bunkfeldt Broadcasting Corporation v. FCC,* No. 82-1212 (D.C. Cir. January 6, 1983). Our action resolving the clear channel proceeding was affirmed in *Loyola University v. FCC,* 670 F.2d 1222 (D.C. Cir. 1982).

[33] Given the absence of any local programming obligations, we do not find Press' proposal for an "underserved communities" preference to be in the public interest. Further, it appears that utilizing preferences other than those specified in the statute and *Conference Report* would be contrary to law. Press' proposal that "Tier III" applications for such communities be processed at an early date

65. An important aspect of the preference system is the manner in which various ownership interests are defined. The *Conference Report* states, at 45, that with respect to both the diversity and minority preferences, "the Conferees expect that the Commission shall evaluate ownership in terms of the beneficial owners of the corporation, or the partners in the case of a partnership. Similarly, trusts will be evaluated in terms of the identity of the beneficiary."

66. In light of our further review of the *Conference Report*, and having reflected upon the comments of the parties, we will adopt our initial proposal that both general and limited partnership interests be considered in determining the ownership of a partnership. We believe that the *Conference Report's* focus on "individuals who are participants in a . . .partnership," at 44, coupled with its intention that we consider "the partners," commends this result. Additionally, the emphasis on beneficial ownership interests in other entities suggests the similar inclusion of limited partners.

67. There is no doubt of the Conferees' intent that "a majority interest" be held in order for a minority preference to be awarded. Including limited partnership interests in this computation should increase the frequency with which such ownership can be achieved.[34] We believe that profit shares should be determinant of ownership of partnership interests. Thus, a five percent share of annual profits will be viewed as a five percent partnership interest. Use of this single measure will facilitate our ability to process applications with ease, and is consistent with the Conferees' emphasis on beneficial ownership. We will adopt the apparently noncontroversial proposal in para. 38 of the *Notice*, that in computing diversity preference eligibility the media holdings of the partnership itself be considered together with the combined cognizable holdings of the partners. In considering ownership interests, we will utilize the proposed 1% benchmark for cognizable ownership interests. This action will eliminate any *de minimis* ownership interests from consideration while remaining true to the intent of the Conferees.[35]

68. In the *Notice*, we proposed that non-stock corporations and unincorporated associations be treated "in a manner similar to

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might have an unfair impact upon other applicants, and would, due to the interrelated mutually exclusive status of many applications, also require us to process numerous applications that do not have "underrepresented" status out of normal order. We do not believe this proposal should be adopted.

[34] Conversely, however, considering the ownership interests of limited partners may have a negative impact on the ability of minority entrepeneurs to benefit from the diversity preference.

[35] The rule tracks, but is not identical to, the Commission's current "attribution" rules. Its function is to exclude minor interests from consideration in calculating eligibility for lottery diversity preferences. Revision of this rule may be undertaken consistent with the outcome of our determinations in MM Docket No. 83–46, *Corporate Ownership Reporting and Disclosure by Broadcasting Licensees*, 48 Fed. Reg. 10082 (March 10, 1983).

partnerships in which each member holds an equal share." We agree with IBN and the Corporation for Public Broadcasting ("CPB") that nonstock corporations, as well as licensees operated by commissions, boards, or other governmental bodies should be judged as to minority status on the basis of the composition of the board. We believe this treatment also should apply, for diversity purposes, to the holdings of board members. The same treatment should be afforded both nonprofit and for-profit nonstock corporations. We do not concur, however, with CPB's opposition to our consideration of the membership of nonprofit corporations or unincorporated associations when such entities are membership organizations. Action consistent with the thrust of the *Conference Report* suggests consideration of the composition of the membership as to minority and diversity preferences. In order to minimize costs, we will authorize appropriate recognized sampling methods to be used in organizations with more than fifty members.

69. Upon further consideration of our *Notice* proposal, at paras. 39–40, regarding treatment of trusts, we believe that as to the minority ownership preference, the percentage each beneficiary derives as a portion of the whole should be considered, with more than fifty percent total minority share being required in order for preference to be awarded. This is consistent with the qualitative manner in which partnership interests are being treated, and appears more appropriate than our initial proposal to base this computation on mere numbers of minority beneficiaries. We will adopt as proposed our plan for the treatment of trusts for diversity purposes. Thus, if either the trust or its beneficiaries, or the trust and beneficiaries combined hold more than fifty percent of any medium of mass communications, these interests will be attributed to the trust applicant. An exclusion of interests of beneficiaries receiving less than 1% of trust income will be applied.

70. We also will adopt the *Notice* proposals regarding treatment of corporate ownership interests, as presented at paras. 41–42 of that document. The corporate applicant, by its officers, will be required to certify both as to the minority status of the holders of beneficial interest in a majority of the corporation's voting stock, if claiming such a preference, and as to any diversity preference claims. To derive this data, corporations with more than fifty shareholders will be permitted to use appropriate sampling procedures, if necessary. Such sampling methods are presently used in ascertaining alien ownership interests. A one per cent attribution benchmark will be applied in the diversity context, as proposed.[36]

[36] As to spousal ownership interests, we will, in computing the lottery diversity preference, treat such holdings in the same fashion as other family relationships. That is, spousal relationship, standing alone, will not be presumed to create common control over a mass media entity in which one spouse has an interest. Thus, we will, in the lottery context, look for diversity purposes to the general

71. *Definition of Mass Media.* In the *Notice*, we proposed to include daily newspapers in the definition of "media of mass communications" for calculating the diversity preference. American Newspaper Publishers Association ("ANPA") asserts in its comments, however, that it would be erroneous to consider newspapers as media in the lottery context since print media is not mentioned in the statutory definition. Although newspapers are not included in the open-ended statutory definition, the Conference Report, at 43, indicates that newspapers should be so included.[37] Moreover, we believe that newspapers should be included in the definition to further the Commission's long-recognized public interest goal of promoting diversity of viewpoints. *See, e.g., FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

72. By including daily newspapers[38] in the statutory definition of mass media, we are not precluding newspapers from applying for LPTV licenses. The effect of our action, which is meant to increase the diversity of voices, is to make a newspaper owner applicant ineligible for an LPTV diversity preference in the community in which it publishes. Thus, all other things being equal, it is more likely that a non-media owning applicant will be more successful in a LPTV lottery than an applicant who owns no other print or electronic media.

73. We concur in Microband's view that Congress did not intend MDS to be considered as a mass communications medium so long as it is regulated as a Common Carrier Service in which the MDS licensee lacks direct editorial control over the programming. The statutory language includes in the "media of mass communications" MDS "and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee." The *Conference Report* adds clarity to this definition by observing that in services such as MDS, "which may be neither clearly common carrier nor broadcast entities," preferences need be used in lotteries when licensees have the ability to exercise direct editorial

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view of family relationships found in such cases as *KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605, 607 (1974), and not to the presumption regarding spousal ownership interests stated in cases such as *Lady Sarah McKinney-Smith*, 59 FCC 2d 398, 401–402 (1976), and *Alexander S. Klein*, 86 FCC 2d 423, 426 (1981). The action taken here is consistent with the *Conference Report's* view, at 45, that women, which it states to be "significantly underrepresented" in telecommunications ownership, should "substantially benefit" from the lottery preference scheme.

[37] A statutory definition that specifies "include" is a term of enlargement and not of limitation. *Highway & City Freight Drivers v. Gordon Transports, Inc.*, 576 F.2d 1285, 1289 (8th Cir. 1978).

[38] A daily newspaper is one that is published four or more days per week in the English language and is circulated generally in the community of publication. A college newspaper is not considered as being generally circulated.

control over a substantial proportion of the programming or information services offered. It appears appropriate to treat MDS ownership in the same manner when MDS permittees or licensees participate in lotteries in other services, such as LPTV. Thus, present MDS licensees will be eligible for diversity preferences in LPTV without regard to their MDS holdings. However, this matter will be revisited if MDS is at some future time treated as a broadcast type service.

74. *Translators as Mass Media.* We do not agree with comments to the effect that translators should not be considered mass communications media. Under Section 74.732(e) of the Commission's Rules, an existing translator station immediately may commence low power operation upon notification to the Commission. It would raise serious questions regarding the legitimacy of the Commission's processes were we to award diversity preferences to translator operators who subsequently could convert their operations to LPTV status by letter.

75. *Local Ownership and the Diversity Preference.* The *Conference Report* states, at 43, that "the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in the licensing process." The Conferees observe that when a lottery applicant for a mass media license or permit has more than 50 percent interest "in any other medium of mass communications which would be co-located with the licensed facility sought, it would not promote the public interest to give such applicant a preferred status relative to other applicants." Thus, in any mass media lottery, no diversity preference will be awarded to an applicant whose owners, when aggregated, have controlling interest (over 50 percent) in any medium of mass communications in the community for which the grant is sought. The *Conference Report* states that the Commission should require certification as to whether an applicant holds such an interest "a prerequisite for an acceptable application."

76. In the *Notice*, at para. 44, the Commission proposed to "make ineligible for a diversity preference, those applicants the owners of which essentially own more than 50% of a local medium of mass communications." We further proposed to require applicants to certify that they did not hold a controlling interest in media of mass communications serving "the community wherein the license or permit is sought." It is clear that the essence of the concerns evidenced in the *Conference Report* and reflected in our *Notice*, is that no diversity preference be provided those applicants who already control a medium of mass communications in the same locality in which the new facility is sought. Difficulty in implementation arises, however, when attempting to equate "locality" with the term of art "community of license." The notion of a "community of

license" is not particularly relevant in this context, because LPTV licensees are not required to serve a given "community" as such.[39] Therefore, in order to implement the proposed restriction with appropriate regard to concerns about local media concentration, we will, in LPTV, adopt contour encompassment standards modeled on our "one to a market" restrictions. Diversity preferences will not be awarded to applicants whose owners, when aggregated, have a controlling interest in stations whose stated contours wholly encompass or are encompassed by the protected predicted contour of the LPTV station for which the license or permit is sought. Similar restrictions will be applied to co-located cable television systems and daily newspapers. Certification as to this status will be included in the revised LPTV application. Existing applicants must complete the certification at the time their applications appear on an "A" cut off list or when they are otherwise notified of the need to amend.[40]

77. *Ex Parte Rules.* Low power television proceedings will

[39] *See* LPTV *Report and Order, supra,* at paras. 14–15, 62. However, in order to effectuate the Conferees' intent that no diversity preference be given to those owning other media of mass communications in the same locality, it will be necessary to take cognizance of those service areas known as the cable television system's "franchise area" and the daily newspaper's "community of publication," and to utilize these as the areas to which the contour of the proposed LPTV station is related.

[40] The standards to be applied in LPTV will provide that no diversity preference be granted to any applicant whose owners, when aggregated, have a controlling interest in the following media of mass communications, if the service areas of those media as described herein wholly encompass or are encompassed by the protected predicted contour, computed in accordance with Section 74.707(a), of the low power TV or TV translator station for which the license or permit is sought:

(a) AM broadcast station—predicted or measured 2 mV/m groundwave contour, computed in accordance with Sections 73.183 or 73.186;

(b) FM broadcast station—predicted 1 mV/m contour, computed in accordance with Section 73.313;

(c) TV broadcast station—Grade A contour, computed in accordance with Section 73.684;

(d) Low power TV or TV translator station— protected predicted contour, computed in accordance with Section 74.707(a);

(e) Cable television system franchise area;

(f) Daily newspaper community of publication.

Additionally, the diversity preference will not be available to applicants whose proposed transmitter site is located within the franchise area of a cable system owned by the applicant and/or its owners or the community of publication of a daily newspaper owned by the applicant and/or its owners. Failure to consider the location of the transmitter site in the community of publication or the franchise area could easily lead to the diversity preference being awarded to existing media owners in a manner contrary to the Conferees' intent. Given this focus on localism, it is clear that the Conferees did not intend that we consider direct broadcast satellite ("DBS")

become "restricted" for *ex parte* purposes from the time that a "B" list is published. Under the current *ex parte* rules, adjudicative proceedings generally become restricted at the time that a hearing designation order is issued. Adjudicative proceedings can become restricted, however, prior to issuance of the hearing designation order, for example, where public notice is given or actual notice is obtained that mutually exclusive applications have been filed. *See* 47 CFR § 1.1203(b)(2). However, this rule goes beyond the requirements of the Administrative Procedure Act, which requires the imposition of *ex parte* restrictions no later than "the time at which a proceeding is noticed (*i.e.*, designated) for hearing" unless actual notice is acquired beforehand. 5 U.S.C. § 557(d)(1)(E). Thus, to comply with our *ex parte* rules, LPTV proceedings will become restricted when the "B" cut off list is published or actual knowledge of mutual exclusivity is acquired, whichever occurs first. This result is justified due to the unusual circumstances of LPTV, *viz.*, the voluminous number of applications and the fact that it is practically impossible to determine, with precision, which applications are mutually exclusive prior to issuance of the "B" list.

78. *Major Changes.* A subsidiary area raised in the *Second Notice* was the treatment of "major change" applications under a lottery system. We are persuaded that the proposal to subject "major change" applications in the traditional broadcast services to processing by lottery should not be adopted now. No basis has been established in this proceeding upon which to apply lottery processing to traditional service "major change" applications separate and apart from the treatment of all other applications in those services.

79. As to "major change" requests in LPTV, we continue to believe that the processing of such applications as initial filings is justified. "Major change" status does not, as CTN erroneously contends, open up the underlying authorization of an existing licensee to competitive challenge. However, the modifications that are treated as "major changes" are considered to be so significant that it would be inequitable to confer any protected status upon them. In our *LPTV Reconsideration Order*, FCC 83–129, adopted separately this date, we are adopting a proposal that modifications of facilities that would not increase the signal range of the station in any horizontal direction be treated as "minor." We believe this will facilitate maintenance-type facilities changes without creating new interference or preclusion. For the reasons stated in the LPTV document, additional adjustment in the handling of major technical changes does not appear appropriate at this time.

80. Pending applications for new facilities and for "major changes" in existing facilities are assigned a new file number when

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operators as owners of "local" media for purposes of this restriction. See *Conference Report*, at 43.

they are amended in such manner that the amendments themselves constitute a "major change." When "major change" amendments are filed after the initial application appears on a cut off list, the application is no longer considered a part of that cut off group, and loses the protection the cut-off list affords. We do not concur in SIN's view that amendments reflecting site changes and similar matters should be treated as "minor," whether or not that would otherwise be the case, prior to issuance of a "B" cut-off list.[41] We observe that the standard for acceptance of LPTV applications is that they be "complete and sufficient." Additionally, under Section 1.65 of the Commission's Rules, applicants are under a continuing obligation to inform the Commission of significant changes in the information they have provided. Thus, all the information on file with the Commission should be current and complete. Allowing amendment of applications as is requested by SIN would add a substantial burden to the already Herculean processing task that the Commission faces in LPTV. It is the responsibility of the applicant to keep the necessary information on file with the Commission so that its rights are not jeopardized.[42]

81. *Channels 70–83 Issue.* We have also determined not to grant KIRO's request that translators wishing to move from channels 70 through 83 be exempt from consideration as "major change" applicants subject to lottery. Channels 70 through 83 were reallocated from broadcast to land mobile use in 1970.[43] Shortly thereafter, we concluded that translators operating on those channels would be afforded protection from the land mobile services only for the balance of their existing license terms, "after which renewals would be granted only on a secondary basis." We noted that while licensees on those channels were not being required to move, "they should be aware of the secondary nature of their authorizations and the possibility of changes to lower channels becoming necessary."[44] More than 800 television translators were in operation on channels 70 through 83 at the time of reallocation. Roughly 600 stations remain in operation on those frequencies today.[45] Applications from such

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[41] As we have noted above, under our newly revised definition of "major change," a site change is in fact treated as "minor" so long as there is no corresponding change in coverage area.

[42] Applicants should note that in the LPTV *Reconsideration*, we are revising our procedures and will henceforth treat LPTV transfers of control as "major changes" in the same circumstances in which this would ordinarily be the case in the broadcast services. Individuals interested in the LPTV applications process should read the *Reconsideration* document.

[43] *Spectrum Space for Land Mobile Services*, 19 RR 2d 1663 (1970).

[44] *Amendment of Part 74, Subpart G (Television Broadcast Translator Stations)*, 23 RR 2d 1504, 1509 (1971). Our policy regarding the secondary status of low power stations on channels 70–83 currently is codified as Section 74.702(a)(3) of the rules.

[45] *Improvements to UHF Television Reception*, 90 FCC 2d 1121, 1127 (1982). We

licensees seeking a channel change are exempt from the LPTV applications freeze.[46] However, it may well be that in a number of cases, such applications will be mutually exclusive with others and will not be granted.[47] We believe the Commission's proper concern in such situations is that service is provided to the public. The nature of this service should be responsive to market demands. It is not the Commission's role to maintain an existing service in perpetuity. Thus, while we will not protect channel 70–83 operators from other applicants for lower channels, we will grant special temporary authority (STA) to such licensees, if a lower channel is available and a move is immediately required by land mobile interference problems.[48] However, these licensees must compete equally with all other applicants for regular low power or translator service on that lower channel and they will be required to cease their STA operation if another party is assigned the channel and is prepared to commence operation. This resolution will maintain the level of service to a community, while removing the Commission from considerations regarding the content of that service. For similar reasons, we will grant STA to translators forced to move by the start of operations of full service stations.

V. *Private Radio Comment Summary*

82. Most of those commenting on our proposals to use lotteries in the Private Radio Services addressed the appropriateness of lotteries in the Private Land Mobile Radio Services ("PLMRS"). Only a few commenters addressed the use of lotteries in the Aviation, Maritime and Private Operational-Fixed Services.

83. Many commenters maintained that lotteries would be inappropriate in any Private Land Mobile Service because the qualifications of competing applicants could always differ. Some commenters recognized, however, that lotteries could expedite the licensing process and be beneficial in certain cases, particularly when the licenses would be used strictly for entrepreneurial commerical purposes.

84. Some commenters were concerned that the use of lotteries in the PLMRS might jeopardize the frequency coordination process.

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determined in the UHF proceeding that new television sets no longer need be equipped to receive channels 70–83. This will make it possible to manufacture sets which perform better on the remaining UHF channels. Manufacturers are not, however, precluded from producing sets which receive channels 70–83.

[46] *LPTV Report and Order, supra*, Appendix E, para. 3.

[47] Only approximately 40 channel change applications are now pending. We expect this level to increase in the near future, as Cellular Land Mobile Communications Systems are licensed to operate on the spectrum in question.

[48] Section 309(f) of the Communications Act requires a party to have pending an application for authorization of service before the Commission is permitted to grant STA. Thus, a translator licensee seeking STA must first apply for regular authority to broadcast on the channel in question.

Another argument advanced by several commenters was that the use of lotteries in the Private Land Mobile Services would be contrary to the spectrum management principles set forth in revised Section 331(a) of the Act. 47 U.S.C. § 331(a). Finally, others raised concerns about public safety, spectrum "trafficking" and the need for expert licensees.

VI. *Private Radio Services Discussion*

85. *Proposals.* In the *Notice*, we recognized that licensees do not receive exclusive use of frequencies in most of the Private Radio Services. Indeed, most frequencies are shared, and the need for comparative hearings or lotteries usually does not arise. The *Notice* did, however, set forth several proposals for implementing lotteries in certain Private Radio Services. In summary, we proposed to use lotteries in the Aviation, Maritime, Private Land Mobile and Private Operational-Fixed Microwave Radio Services. In essence, we proposed to have the option of utilizing the random selection technique in any Private Radio Service where mutually exclusive applications could be filed or where more applications for initial licenses might be received than could be accommodated on available frequencies. Additionally, we requested comments on whether selection by lottery should apply to applications in all the different classes of Private Land Mobile Services.

86. We explained that our overriding concern in making these proposals was to ensure that the public received the benefits of private radio service in the most expeditious manner possible, at the least cost to applicants, with no significant reduction in the qualifications of licensees. Our proposals were based on the premise that in any particular private radio lottery the qualifications of competing applicants to serve the public interest would be without substantial material differences. Under these circumstances, comparative hearings would serve no useful purpose and in large part would result in artificial distinctions without significant differences in licensees' qualifications to serve the public.

87. In the *Notice*, we recognized that under the Communications Act and our Rules, Petitions to Deny may not be filed against applications for Private Land Mobile licenses. We noted, therefore, that formal filings involving oppositions and replies would not be entertained in these services. In the other Private Radio Services where we proposed to select licensees by lottery (e.g. Aviation, Maritime, and Operational-Fixed Services), Petitions to Deny could be filed under our proposed rules in accordance with statutory requirements. 47 U.S.C. § 309. We proposed to streamline the lottery in these services, however, by requiring that Petitions to Deny be filed against applicants before the lottery and only those that were filed against the tentative selectees would be reviewed after the lottery. We noted that this would enable us to eliminate the

necessity of a second time-consuming Public Notice inviting Petitions to Deny. Also, because the Private Radio Services do not currently involve "media of mass communications," we proposed to conduct all Private Radio Bureau lotteries without awarding significant preferences to any applicants. We believed that these proposals would ensure that lotteries were "extremely simple" in the Private Radio Services, as Congress had prescribed. *Conference Report* at 46.

88. *Lotteries in Private Land Mobile Radio Services.* Many of those commenting in response to the *Notice* took issue with these proposals. In particular, they questioned our proposal to use lotteries to select licensees in the Private Land Mobile Radio Services (Part 90). Some commenters referred to Section 120 of the Communications Amendments Act of 1982, the same legislation that authorizes the Commission to use lotteries to select licensees. That section establishes guidelines for the Commission's management of the Private Land Mobile spectrum. It directs the Commission to consider certain principles such as public safety, spectrum efficiency, competitive markets and interservice sharing. 47 U.S.C. § 331.

89. Some commenters argued that our proposed use of lotteries in these services was inconsistent with these new statutory guidelines, particularly those relating to public safety. They stated that there are significant differences in the abilities of many applicants to serve the public interest. They pointed to the legislative history of the new private land mobile legislation, which stresses the Commission's obligation to promote the private land mobile spectrum needs of police departments and other public agencies using the spectrum to protect the American public. This concern was also expressed by some of those commenting in regard to the use of lotteries in the Operational Fixed Microwave Service (Part 94), where eligibility is based on Part 90 of the Rules (Private Land Mobile Services).

90. Many of these commenters were concerned about the use of lotteries in particular cases. For instance, the American Association of State Highway and Transportation Officials (AASHTO) opposed the use of lotteries in the Highway Maintenance Radio Service. Forest Industries Telecommunications (FIT) opposed lotteries in the Forest Products Radio Service. The Association of Public Safety Communications Officers, Inc. (APCO) and the Los Angeles County Sheriff's Department were against lotteries for public safety frequencies. UTC, the Utilities Communications Council, opposed the use of lotteries in the Power Radio Service and Operational Fixed Service. In essence, these parties and others argued that the Commission should rely on comparative hearing procedures to select the "better qualified" licensee. They also emphasized the importance of frequency coordination in accommodating the maximum number of licensees in a limited amount of spectrum.

91. We are convinced, however, that the new statutory guidelines for managing the Private Land Mobile spectrum—promoting

safety, improving spectrum efficiency, reducing regulatory burdens, encouraging competition, providing services to large numbers of users, and increasing interservice sharing opportunities—are consistent with our proposal to use lotteries in the Private Land Mobile Services. The *Conference Report* makes it clear that these guiding principles, all of which were recognized as important goals, were *not* intended to be exclusive and that the Commission may consider any other relevant factors in the public interest. Moreover, not all of these guidelines need be considered by the Commission in each individual case. *Conference Report* at 52.

92. The *Conference Report*, we believe, encourages us to use lotteries in these services if it is done in a manner consistent with these new statutory guidelines. The *Conference Report* discourages the use of "auctions or similar economic methods" to assign this portion of the spectrum, but does state that this should *"not be construed to limit the ability of the Commission to use lottery procedures for purposes of granting private land mobile licenses . . . ."* *Conference Report* at 53, (emphasis added). This makes it apparent that Congress did not exclude private land mobile applications from the range of possible candidates for a lottery.

93. In certain areas of the country, we expect lotteries to be absolutely essential in some Private Land Mobile Radio Services. In particular, as some of the commenters noted, applications for base station licenses in the Commercial or SMRS pool of frequencies at 800 MHz are prime condidates for selection by lottery.[49] As a result of our recent decision in Docket No. 79–191, 250 new private land mobile channels in the 800 MHz band were released, with eighty channels earmarked for the SMRS pool. *Amendment of Part 90*, 90 FCC 2d 1281, 1299 (1982). Unlike the other pools, SMRS base station licensees were authorized to provide a communications service to eligibles for profit. We have already received far more applications for SMRS frequencies in some geographic areas than can be accommodated in the available spectrum. *See* FCC Public Notice, 2459, February 17, 1983. For instance, in the SMRS pool in the Los Angeles area alone, we have received approximately 250 applications requesting 1200 frequencies. Only 80 frequencies are available for assignment in that pool and in all likelihood only 16 applications will be granted. A comparative hearing of this scope, even a "paper" proceeding, would be unworkable for all practical purposes unless coupled with a lottery. We believe that traditional comparative hearings in these circumstances would undoubtedly delay service to the public and would not result in the selection of significantly more qualified licensees. This would clearly be inconsistent with our public interest responsibilities and the new statutory guidelines.

[49] FIT, SIRSA, and AAR suggested that lotteries would be appropriate for SMRS licenses.

Other major urban areas are faced with similar demand for these frequencies.

94. This is precisely the type of situation described in the *Conference Report* as appropriate for selection by lottery. There are large numbers of licenses available; there are large numbers of applications because new frequencies have been made available; there would be a significant backlog of applications without a lottery; and a lottery would speed up the process of getting service to the public. *Conference Report* at 37.

95. *Case-by-Case Use of Lotteries.* We interpret the *Conference Report* as encouraging the Commission to utilize lotteries in the Private Land Mobile Services, where necessary, on a case-by-case basis consistent with the new statutory guidelines for managing these services. In the *Conference Report*, Congress made it clear that the lottery authority was discretionary in nature and that a service should not be subject to a lottery if the traditional comparative process would provide a superior means of diversifying media ownership in particular instances. *Id.* at 37–38. It is apparent that Congress' main concern in preserving comparative hearings in these circumstances and in developing a significant preference scheme in the lottery procedure was to ensure diversification in the Mass Media Services. These concerns are not relevant at this time in the Private Radio Services, where licensees do not engage in mass media programming or the distribution of video entertainment to the public.[50]

96. We do not intend to apply the lottery selection process automatically or mechanically in these services. As some commenters suggested, expedited hearing proceedings may be used initially to apply comparative criteria in specified radio services to determine which applications will be granted, denied or subject to random selection. This will ensure that in any particular Private Land Mobile lottery there will be no substantial material differences in the applicants' abilities to serve the public interest.[51] Lotteries will not be utilized if the proposed uses of the spectrum would serve the public in materially differently ways. We would not, for example, utilize the same lottery to select between applicants proposing the use the spectrum for public safety purposes and those proposing non-

[50] Parallel Communications Corp., the AAR and SIRSA recommended that lotteries be used to select from among competing applicants in the Private Operational Fixed Microwave Service who filed for the use of multi-directional systems as a result of Docket No. 19671, *First Report and Order*, 86 FCC 2d 299 (1981), *reconsideration pending.* As stated in the *Notice*, we will grant appropriate significant preferences if any applications involving mass distribution of video entertainment are processed in the future by lottery.

[51] The comparative criteria to be applied to particular groups of applications to determine if they should be subject to a lottery will be established in subsequent service-specific proceedings. *See, e.g., Amendment of Part 90*, 90 FCC 2d 1281 (1982).

public safety use. We expect this to minimize the concerns expressed by APCO, UTC, the Los Angeles County Sheriff's Department and others about the use of lotteries to select from among competing applicants proposing significantly different uses of the spectrum.

97. Some commenters have expressed their concerns that the use of a lottery will somehow adversely affect the frequency coordination process used so effectively in these services. They reference the new legislation, which specifically authorizes the Commission to accept the services of non-Federal Government advisory committees in coordinating the assignment of these frequencies.[52] They are concerned that lotteries will prevent the coordinators from using good engineering practices to arrive at solutions to difficult assignment problems.

98. We do not expect any lottery in these services to affect the coordinators adversely. We have not proposed in this proceeding any changes in the rules regarding frequency recommendations by coordinators, nor have we intended to create the impression that assignments will not be based upon good engineering practices. We will continue to utilize the services of the coordinating committees, as authorized in the new legislation, and we will continue to follow the guidelines delineated in the new legislation for managing these services, including efficient spectrum utilization and good engineering practices.

99. Questions have also been raised concerning the applicability of the Commission's "anti-trafficking" rules to lotteries in the Private Land Mobile Services in light of current loading and construction requirements. *See, e.g.*, 47 C.F.R. §§ 90.358, 90.609. We wish to make it clear that we have not altered the transfer and assignment rules in these services, nor have we seen any reason in the record of this proceeding to change the loading and construction requirements in any way as a result of a lottery.

100. *Aviation, Maritime and OFS Services.* We received few comments on our proposals to use lotteries in the Aviation Services (Part 87), the Maritime Services (Part 81) and the Operational-Fixed Microwave Radio Service (Part 94). Some commenters claimed that lotteries were inappropriate in these services because some types of these stations are expensive to construct and the qualifications of competing applicants could differ greatly. Others argued that lotteries would be beneficial in these services.

101. In light of these comments, we will use comparative hearing procedures in these services when it appears upon initial analysis that there are significant differences in the abilities of competing applicants to serve the public. On the other hand, when it appears upon initial analysis that there are no substantial material differences in the qualifications of competing applicants, we will select

[52] 47 U.S.C. § 331(b).

licensees by lottery. In this way, lotteries will be used to resolve "tied cases" when comparative hearings would serve no useful purpose. In making this public interest determination whether applications in these services should be subject to a comparative hearing or lottery, we may consider such factors as public safety, service coverage area, operator experience and spectrum efficiency. Other relevant factors may also be taken into account. Our reasons for using lotteries or comparative hearings will be specified in public documents in each individual case. By using lotteries selectively in these services, we expect to expedite service to the public in appropriate cases while ensuring that licensees always remain fully qualified. This is one of the four factors specifically referenced in the *Conference Report* for our consideration in determining whether to utilize our lottery authority. In any instance where we select licensees by lottery in these services, we will make the affirmative finding, required by the Conferees, that the public interest will be significantly benefited. *Id.* at 37–38.

102. In the Private Radio Services, therefore, we are adopting the rules essentially as proposed. We will utilize lotteries only when it appears that there are no substantial and material differences in the qualifications of competing applicants to serve the public interest. Prior to the lottery, applications will be reviewed to determine that they are acceptable for filing and comparative criteria may be applied. This will ensure that lotteries will occur in these services only when comparative hearings would serve no useful purpose. Only qualified applicants will receive license grants. If it is determined that an initial tentative selectee is not qualified to receive the license grant, another tentative selectee chosen from among the same applicant pool during the same random selection will be designated until a qualified applicant is selected. It will not be necessary to conduct a separate second lottery in the Private Radio Services.[53] The selective use of lotteries will allow us to address the concerns of the commenters on a case-by-case basis and, we feel, will result in significant public interest benefits. It will enable us to ensure that the public receives private radio service in the quickest way possible, at the least cost to applicants, with no significant reduction in the qualifications of licensees. Based on our review of the *Conference Report*, we are convinced that Congress expected us to maintain the option of utilizing lotteries under these circumstances.

103. We are persuaded, in light of the comments favoring the use of comparative criteria in the Private Land Mobile Radio Services (Part 90), that licensees should be selected by lottery in these services only after expedited paper proceedings have shown that the

[53] The *Conference Report* indicates that a second lottery is necessary only after an initial tentative selectee has been determined to be unqualified in the mass media services, because selection probabilities in those cases will have to be recomputed. *Conference Report* at 39–40.

qualifications of the competing applicants are without substantial and material differences. As a procedural matter, Petitions to Deny are not authorized in these services (47 U.S.C. § 309; 47 C.F.R. § 1.962). Prior to the lottery, therefore, we will review informal complaints against applicants and will use "paper" hearing procedures to apply comparative criteria developed in separate proceedings (*e.g.*, Docket 79–191, *supra*). After the paper proceeding, and in light of the number of frequencies available for assignment, those applications that are clearly superior will be granted. Those that are clearly inferior will be denied. Those that are without substantial and material differences will be designated for random selection if frequencies remain available for assignment.

104. After the random selection, having already determined through the paper proceeding that the applicants are qualified to become licensees, any new allegations that the applicants are not qualified to be licensees will be handled through the Petition for Reconsideration process or through license revocation proceedings under 47 U.S.C. § 312.

105. In the other Private Radio Services where licensees may be selected by lottery (Maritime, Aviation and Operational Fixed Microwave Radio Services; Parts 81, 87, and 94), Petitions to Deny may be filed against applicants. The paper proceeding, if any is necessary, will therefore occur after the lottery selection process has been completed. It will be based upon the Petitions to Deny that were filed against the tentative selectee prior to the lottery.

106. In short, the paper proceedings in the Private Land Mobile Services will occur before the lottery and will be used to ensure that only those applications without substantial and material differences are designated for lottery selection. On the other hand, in those Private Radio Services where Petitions to Deny are authorized, we will require that the Petitions be filed before the lottery and only those that have been filed against the tentative selectee will be reviewed after the lottery is conducted. Paper proceedings, if necessary in light of the Petitions to Deny, will be held at that point. In both situations, only qualified applicants will receive license grants. In the Private Land Mobile Services, this will be determined by paper proceedings held before the lottery. In the other Private Radio Services, it will be guaranteed by the Petition to Deny process.

107. Any paper proceeding in the Private Radio Services will be administered by the Commission. The Commission will receive the evidence and issue the final decision awarding licenses to applicants and/or designating applications for random selection. The Private Radio Bureau will serve as advisor to the Commission and will be responsible for reviewing pleadings and preparing a draft of the final decision. The Bureau will not appear as a party unless the Commission orders it to do so in a particular case. If the Bureau participates as a party, it will do so through separated counsel.

108. A public notice will start the paper proceedings. The notice will identify the applications involved and will include the hearing designation order, the issues, and the pleading schedule and procedures to be followed by the parties in the paper proceedings. Because of the Private Radio Bureau's role as advisor to the Commission regarding these applications, the Chief, Private Radio Bureau and his staff will be considered to be decision-making Commission personnel for purposes of *ex parte* contacts regarding any hearing conducted pursuant to these procedures. However, should any of his staff be designated as separated counsel for the purpose of participation as a party in any hearing, they will be non-decision-making personnel.

109. If the Commission concludes that an oral proceeding is necessary, it will issue an interlocutory order directing an Administrative Law Judge to hear a particular issue or issues. The order will specify the issue or issues and will establish the procedures to be followed.

110. At the conclusion of the paper proceedings for Private Land Mobile licenses, applications will be granted, denied or designated for random selection. In the other Private Radio Services, at the conclusion of the paper proceeding tentative selectee will receive license grants or will be determined to be unqualified. If it is determined that a tentative selectee in any of the Private Radio Services is unqualified after a lottery has been conducted, the license will be awarded to the next tentative selectee selected from the same lottery.

111. As stated in the *Conference Report* at 46, we expect the lottery procedures for these non-media services to be "extremely simple." Public Notices will specify the date, time, location of, and additional procedures for lotteries in the Private Radio Services.

VII. *Common Carrier Comments*

112. All of the comments addressing the issue of lotteries in the Cellular Radio Service supported the exclusion of cellular service from lottery procedures. Many parties opposed using lotteries in the rural radio and offshore radio services. Some parties also suggested that some or all of the public land mobile services be excluded, particularly in cases where an applicant proposes to expand an existing system, either by adding a frequency or by proposing a wide-area system. Some parties questioned whether a lottery would expedite application processing and suggested higher threshold financial and technical standards. Concerns were raised by some commenters regarding trafficking and spectrum warehousing. One party requested that preferences be awarded for local ownership and non-profit cooperatives. Finally, one party opposed lotteries on the grounds that they may be inconsistent with State certification procedures.

VIII. *Common Carrier Services Discussion*

113. *Lotteries in the Public Mobile Service.* In the *Notice*, we proposed to conduct lotteries for mutually exclusive applications in all of the public mobile land services except for the Cellular Radio Service.[54] In our discussion, we referred to new allocations for 35 MHz paging (CC Docket No. 80–189) and 900 MHz paging (Gen. Docket No. 80–183) and to the extremely large number of applications which were expected for these new frequencies. Thus far we have received nearly 6,500 applications for the frequencies. A substantial number of these applications involve mutually exclusive ("MX") situations. We also expressed our skepticism that existing criteria will provide a meaningful mechanism for selecting among MX applicants and cited the overwhelming administrative burden of comparative proceedings for all the anticipated MX applications.

114. Some of the comments suggest that a lottery is inappropriate in the public land mobile services and that, in making its common carrier proposal, the Commission failed to consider the four factors listed in the *Conference Report*. We discuss these factors and findings related to them at this point. First, there is a large number of licenses available (including licenses for systems operating on previously allocated frequencies). Second, there is a potentially large number of mutually exclusive applications.[55] Third, there is a significant back-log which a lottery will reduce. The fourth criterion, diversity of information sources, does not apply to these services. Our decision to apply a lottery to the public land mobile services is based instead on the strong applicability of the other three tests.[56] We conclude, therefore, that a lottery is appropriate for the public land mobile service.

115. Some of the comments (Telocator's, for example), while not objecting to the use of a lottery in these services, oppose its application to all frequency bands. The comments suggest that the Commission distinguish between the newly allocated frequencies (for which, in limited cases, they support a lottery) and the rest of the land mobile frequencies (for which the comments oppose a lottery). The parties refer to the following language in the *Conference Report*: "Relevant factors for the Commission's consideration. . . include . . . whether there is a large number of mutually exclusive applications

[54] The public mobile services include paging, two-way land mobile telephone service, two-way air-ground service, offshore telecommunications service, rural radio service, and cellular radio service. The cellular radio service is not included in this proposal for implementing lottery rules.

[55] The precise number of mutually exclusive applications will not be determined until the 900 MHz applications are loaded into the automated data base and analyzed.

[56] See below, however, our discussion of the rural radio and offshore services.

for each license, for example, *when a new service is initiated.*" *Conference Report* at 37, (emphasis added).

116. In our view, the above position is based on a confusion of the term "newly allocated frequency band" and the term "new service". While the *Conference Report* uses "new service," it did so only as an example of a situation where a back-log of applications might occur. The pertinent legislation was written in the context of, but was not confined to, the initiation of low-power television, which clearly is a new service. The allocation of additional frequencies for public land mobile service is not, strictly speaking, the initiation of a new service. Therefore, in implementing a lottery, we seek not simply to expedite low band and 900 MHz applications, but all public land mobile applications. While the bulk of our back-log of applications will be for newly allocated frequencies, all applications are processed similarly and are of equal priority. All land mobile applications will therefore be expedited by a lottery, not just those for newly allocated frequencies.

117. *New and Existing Systems.* Telocator further opposes the use of a lottery in cases where an applicant requests an additional frequency to develop a wide-area system or to relieve congestion on a trunked mobile telephone system. Initially, we note that paging systems do not use trunking, so the argument as to congestion relief is of limited applicability to this discussion. The newly-allocated frequencies are for paging. The bulk of the anticipated back-log is related to these new frequencies, and not to situations where existing licensees seek additional two-way frequencies to relieve congestion on mobile telephone systems. The Commission is nevertheless mindful of the competing interests of new applicants seeking a first channel and established carriers who seek to enhance their existing systems. In our view, the solution to this problem is to make additional frequencies available, so that all parties, whether new entrants or established carriers, may have access to frequencies. Our recent allocation for cellular radio has responded to this problem, as have the low-band and 900 MHz allocations for paging. The lottery, on the other hand, is not designed to relieve frequency shortages but rather to expedite the licensing process, so that all applicants, whether new entrants or existing carriers seeking another frequency, may have their applications expedited. We also note that, even under the present rules, established carriers receive no preference over new entrants in a comparative proceeding, so a lottery does not place established carriers in a less advantageous position *vis a vis* new entrants.

118. The Commission is also aware of the desire of carriers to obtain additional frequencies to provide wide-area service. In the 900 MHz allocation, we recognized the need for wide-area public mobile service and specified frequencies for network and regional paging systems. *First Report and Order*, 89 FCC 2d 1337 (1982). In describing

how these applications would be processed, the Commission stressed that its purpose was to employ the most expeditious way to equitably process applications and make assignments. *Id.* at para. 49. To accommodate these applicants interested in establishing wide-area systems, we would apply a liberal assignment and transfer policy when licensees wish to trade their 900 MHz frequencies. For example, applicant "A" wishes to construct a wide-area system operating on frequency "1". If in one site, however, applicant "B" obtains frequency "1", and "A" proposes to purchase the constructed facilities from "B" in order to provide service on frequency "1" throughout the entire area, the Commission would give liberal consideration to the assignment application. We propose a similar approach in the case of the lottery procedure, thereby remaining consistent with the Commission's goal of expediting the licensing process while also taking into account the interests of those carriers providing wide-area service.[57]

119. *State Certification and Other Concerns.* In its comments NARUC opposes the lottery on the ground that it may undermine the state certification process for radio common carriers. We reject this view, however, since Section 22.13 will remain in effect, requiring all licensees to comply with all applicable state certification requirements. 47 C.F.R. § 22.13.

120. TDS expresses the concern that lottery winners will engage in trafficking and thus frustrate the lottery's purpose of expediting service to the public. TDS requests that a two-year anti-trafficking provision be applied to lottery winners in the public mobile services. We reject this suggestion. The language discussing the trafficking issue in the *Conference Report* (pp. 45–46) is confined to the mass communications media service and is clearly related to the Conferees' concerns as to preferences awarded in lotteries and the diversity of ownership in those services. No preferences are awarded in the public mobile services and diversity of ownership is not at issue in lotteries involving these carriers. The trafficking issue as it affects the public mobile services is discussed in detail in CC Docket No. 80–57, 47 Fed. Reg. 43842, and goes beyond the scope of the lottery proceeding.

121. TDS requests that proposed rule Section 22.32(g) be amended to explicitly state that no preferences will be awarded in lotteries involving these services. This request is consistent with the intent of

[57] The Commission's 900 MHz proceeding makes provision for nationwide paging systems, a technological advance with which the Commission has not had previous experience. Although in this *Second Report and Order* we implement lottery proceedings for 900 MHz applications in general, we reserve the option to decide in the 900 MHz proceeding whether lotteries are appropriate for applicants proposing network paging systems. *See First Report and Order*, Gen. Docket No. 80–183, 89 FCC 2d 1337 (1982).

the Act (*see Conference Report*, p. 41), and we will revise the rule accordingly.

122. *Offshore and Rural Radio Services.* In the *Notice*, the Commission proposed to include the offshore telecommunications service and the rural radio service in the common carrier lottery. This proposal was widely opposed in the comments, basically on the ground that, using the four factors listed in the *Conference Report*, neither service is appropriate for a lottery. Upon consideration of the four factors, the language in the statute, and the comments, we have concluded that these two services should not presently be included in the lottery proceeding. Neither service involves a large number of licensees or mutually exclusive applications, and neither service has a significant back-log. Moreover, we can perceive no other "salient consideration" that would compel us to use lotteries in these services. *See Conference Report* at 38. We reserve, however, the option of reexaming the applicability of a lottery to either of these services if, in the future, any of the above factors should significantly change. We note in particular that the Commission has recently proposed to allocate additional frequencies in the Offshore telecommunications service. *See Notice of Proposed Rule Making*, Gen. Docket No. 83–45, FCC 83–35, released February 22, 1983. If in the future, the number of mutually exclusive applications in this service should increase substantially, we may at that point propose to implement a lottery to more expeditiously process the applications.

123. *Telephone Cooperatives.* The Bledsoe Telephone Cooperative, Inc. ("Bledsoe") opposes a lottery in common carrier services on the grounds that the procedure would be counterproductive to the provision of quality service needed in rural areas. Bledsoe suggests that preferences be awarded for local ownership and non-profit cooperatives. The Commission is cognizant of the high quality of service provided by non-profit cooperatives, particularly in rural areas where high quality service may not otherwise be available. We have decided above not to use lotteries in the Rural Radio Service; accordingly, our decision implementing lotteries is not likely to affect telephone cooperatives at all.

124. *Pre-Lottery Screening.* Tymnet, Inc., urges the Commission to screen applicants carefully prior to the lottery. We will not engage in such comparative consideration at the pre-lottery stage, nor will we attempt to distinguish between superior and marginally qualified applicants in these common carrier services, as Tymnet suggests. In our many years of regulating these services, we have found the overwhelming majority of carriers to be fully qualified in all respects. Even when a marginal operator is licensed, there is little potential for harm to the public interest because there are many operators in most markets from which customers may choose. Furthermore, most states regulate the market entry or rates, or both, of the radio common carriers and telephone companies

providing mobile services. This serves as an additional, important check on their qualifications. Accordingly, we will not adopt the Tymnet proposal because it would impose time and resource burdens on Bureau staff without achieving significant public interest benefits in the common carrier area.

125. *Common Carrier Procedures.* The Appendix includes rules in Part I and Part 22 outlining procedures to be used for lotteries in the Common Carrier Bureau in general and in the Public Land Mobile Service in particular. Other common carrier services which may in the future use lotteries will be added to the list, after appropriate proceedings, in Section 1.821 ("Scope").[58]

126. Under the common carrier lottery, the same procedures currently set forth in our rules will be followed as to application filing, acceptance or dismissal, public notice, and as to filing of petitions to deny.[59] Where it is determined that properly filed applications are mutually exclusive, a lottery will be held under the direction of the Bureau Chief. No preference will be awarded to common carrier lottery participants, consistent with the language in the Conference Report (p. 41). Pleadings filed against mutually exclusive applications will not be reviewed prior to conducting the lottery. The Commission will hold the lottery and then will review only the pleadings filed against the tentative selectee. This approach conserves staff time ordinarily spent reviewing pleadings filed against non-selected mutually exclusive applications. We believe the filing of Petitions to Deny pre-lottery, although at variance with that to be applied to low power television applications, best suits the individual demands of the common carrier processing function. Compare our discussion at para. 31 *et seq.*, *supra.*

127. The staff will review the selectee's application and related pleadings. If the applicant is qualified, the staff will grant the application. If, however, a substantial and material question of fact remains, the application will be designated for hearing. We retain the option of sending the case to an Administrative Law Judge or to the Commission *en banc* or one or more Commissioners, and our rules reflect that option. Whether the proceedings are conducted by the ALJs or the Commission, they will be based primarily on written submissions. We intend to reduce the expense and delay associated with unlimited discovery, extensive cross-examination and motions to enlarge, and we will specify how those limitations are to apply in each designation order. In those cases referred to ALJs, all appeals

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[58] As we noted above, we have reserved the option of deciding in the 900 MHz proceeding (Gen. Docket No. 80–183), whether to include network paging applications in the lottery proceeding.

[59] In general, our rules for conducting a common carrier lottery are inserted in the Part I and other applicable rules parts. General rules for processing applications have been retained and will apply to all situations except those in which a lottery is conducted.

taken by exception to the Initial Decision will go directly to the Commission and will not be subject to intermediate review by the Review Board. *See* note 20, *supra*. If the selectee's application is denied, the Commission will proceed to review the application of, and any pleadings filed against, a second selectee. In the public mobile radio services, the lottery will not only identify a tentative selectee but will also rank the applicants so that, if the first selectee is ultimately disqualified, the second (and third, and so on) selectee will have already been identified.

VIII. *Conclusion.*

128. We believe that the actions we have taken in this proceeding represent a prudent exercise of our administrative discretion. We have attempted to implement the lottery statute in a manner that best serves the public interest. This is the Commission's first experience with lotteries; we plan to use our random selection authority cautiously.

129. Lottery processing may be used in those services enumerated above where the lead application was filed on or after August 14, 1981 (the effective date of the first lottery statute). In addition, all pending applications in the low power television and television translator service will be subject to a lottery, including those filed prior to August 14, 1981. *See* paras. 23–25 *supra*.

130. Some of the rules as initially proposed in the *Notice* have been modified after careful consideration of the statute, legislative history and numerous comments. Further rule makings may be necessary to fully develop the Commission's lottery program.

131. Although this Commission is always chary of imposing new regulations on the communications industry, we believe in this case that the benefits of the lottery regulations far outweigh their costs. Lotteries will help speed provision of service to the public by eliminating the costly and time consuming comparative hearings while still maintaining some relative advantage for minorities and others underrepresented in the ownership of mass media facilities. The Commission holds great hope for lotteries, particularly in implementing new services such as LPTV and 800 MHz.

132. *Paperwork Reduction Act.* In accordance with 44 U.S.C. § 3501 *et seq.* and Executive Order No. 12291, the Commission submitted a copy of the *Notice* to OMB for review and comment. OMB's comments were necessary because the NPRM postulated that the rule making could result in additional paper work requirements on applicants for communications licenses. OMB expressed general support for the lottery proposal and made no specific objection to the proposal for applicant certification of preference eligibility. OMB did, however, request the Commission to submit for review any additional information requirements such as new or revised forms

that may result from this proceeding. In accordance with that request, we will seek OMB comment on revised FCC Form 346.

X. *Regulatory Flexibility Act - Final Analysis.*

133. *Need for and Purpose of Rules.* The Commission proposed the subject lottery rules to implement its recently amended random selection authority. The use of lotteries to select licensees from among competing applicants, it is expected, will serve the public interest by significantly decreasing the cost and delay of traditional comparative hearings. Moreover, safeguards are built into the random selection system so that only fully-qualified applicants receive licenses through the lottery process.

134. *Comments.* Apparently, no comments were received that directly addressed the initial regulatory flexibility analysis.

135. *Alternatives Considered.* As noted in our initial flexibility analysis, there are two alternatives to the lottery proposal. One is to retain traditional comparative hearings; the other is to employ auction techniques. In view of the Congressional direction to implement a licensing lottery, we concluded that there was no practical alternative to establishing lottery procedures.

XI. *Other Matters.*

136. In view of the foregoing and pursuant to Sections 1, 3, 4(i) and (j), 303, 309 and 403 of the Communications Act of 1934, as amended (47 U.S.C. §§ 151–609), it is HEREBY ORDERED that the action taken herein is effective July 5, 1983.

137. It is FURTHER ORDERED that revised FCC Form 346 is amended, as set forth in Appendix D, effective upon receipt of approval from the Office of Management and Budget.

138. It is FURTHER ORDERED that all Petitions to Deny and informal objections pending against any application in the low power television and television translator service are hereby dismissed.

139. It is FURTHER ORDERED, that all applicants who have filed multiple applications inconsistent with Section 73.3521, adopted herein, shall withdraw such applications as are necessary to remedy the conflict no later than thirty days following the effective date of the action taken herein.

140. For general information regarding this proceeding contact Randy Thomas, Office of General Counsel (202) 632–6990. For specific information relating to the use of lotteries in the Common Carrier Service contact Michael Menius (202) 632–6450; Mass Media Service contact Barbara Kreisman (202) 632–3894; or Private Radio Service contact John Richards (202) 634–2443.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendixes B and D -may be seen in FCC Dockets Branch.

APPENDIX A

Comments

American Association of State Highway and Transportation Officials, Special Committee on Communications

American Legal Foundation

American Newspaper Publishers Association

American Telephone and Telegraph Company

Associated Public-Safety Communications Officers, Inc.

Association of American Railroads

Bledsoe Telephone Cooperative, Inc.

CBS, Inc.

Center City Broadcasting, Inc.

Corporation for Public Broadcasting

Cox Communications, Inc.

Daly, Joyce & Borsari

Forest Industries Telecommunications

Frontier Broadcasting Companies

Geller, Henry and Donna Lampert

GTE Service Corporation

International Broadcasting Network

KIRO, Inc.

Local Power Television, Inc.

MCI Airsignal, Inc.

Microband Corporation of America

Mobile Marine Radio, Inc.

Motorola, Inc.

National Association of Broadcasters

National Association of Business and Educational Radio, Inc.

National Association of Regulatory Utility Commissioners

National Conference of Black Lawyers

National Latino Media Coalition (NLMC *et al.*)/Black Citizens for a Fair Media/Telecommunications Research and Action Center/National Association for Better Broadcasting and League of United Latin American Citizens

Offshore Telephone Company

Paul, Hastings, Janofsky & Walker

Pierce, Mark

Press Broadcasting Company

Pride, Pamela

Radio and Television Commission of the Southern Baptist Convention/American Christian Television System, Inc.

Shreveport Metro Communications/Roanoke Media/Horizon Communications

Spanish International Network (and Affiliated Low Power Television Applicants)

Special Industrial Radio Service Association, Inc.

Telephone and Data Systems, Inc.

The Television Center, Inc.

Telocator Network of America

TRT Telecommunications Corporation

Tymnet, Inc.

United Church of Christ, Office of Communication

Utilities Telecommunications Council

Waterway Communications System, Inc.

Youth News (Comments submitted by Media Access Project on behalf of Youth News)

Late-Filed Comments

Community Television Network

County of Los Angeles

Los Angeles' County Sheriff's Department

Informal (Late) Comments

Office of Management and Budget

Palomar Communications

Parallel Communications Corporation

Reply Comments

American Telephone & Telegraph Company

Association of American Railroads

Forest Industries Telecommunications

MCI Airsignal, Inc.

National Black Media Coalition

National Latino Media Coalition, *et al.*

Spanish International Network

APPENDIX C - NEW RULES

PART 1 - PRACTICE AND PROCEDURE

Subpart A - General Rules of Practice and Procedure

1. § 1.65 is amended to read as follows:

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except where paragraph (b) applies, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Except where paragraph (b) applies, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

(b) Changes in information relating to § 1.1622, lottery preferences, must be furnished to the Commission no more than 7 days after the changes occurs until (1) in the case of a non-mutually exclusive application, the Commission releases the Public Notice proposing the application for grant; or (2) in the case of a mutually exclusive application, the Commission releases the final Public Notice announcing the acceptance of the last-filed mutually exclusive application.

2. § 1.227(a)(2) is amended to read as follows:

§ 1.227 Consolidations.

* * * * *

(2) Any applications which present conflicting claims, except where a random selection process is used.

* * * * *

3. In § 1.227, Subparagraph (b)(1) is amended to read as follows:

(b)(1) In broadcast cases, except as provided in subparagraph (5) of this paragraph, and except as otherwise provided in § 1.1601, *et seq.*, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended, if amended so as to require a new file number, is substantially complete and tendered for filing by the close of business on the day preceding the day designated by Public Notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

4. § 1.227, subparagraph (b)(3) is amended to read as follow:

(3) Common carrier cases

(i) General rule

Where an application is-mutually exclusive with a previously filed application, the second application will be entitled to comparative consideration with the first or entitled to be included in a random selection process, only if the second has been properly filed at least one day before the Commission takes action on the first application. Specifically, the later filed application must have been received by the Commission, in a condition acceptable for filing, before the close of business on the day prior to the grant date or designation date of the earlier filed application.

(ii) Domestic public fixed and public mobile

See Rule sections 21.31 and 22.31 for the requirements as to mutually exclusive applications. See also rule Sections 21.23 and 22.23 for the requirements as to amendments of applications.

(iii) Public coast stations (Maritime mobile service) See subparagraph (b)(4) of this section.

5. In § 1.227, subparagraph (b)(4) is amended to read as follows:

(4) In cases of applications filed in the Private Radio Services, except as otherwise provided in § 1.972, any application that is mutually exclusive with another application or applications will be consolidated for hearing with such other application or applications only if the later application in question is substantially complete and tendered for filing by whichever date is earlier: (i) Not later than the close of business 1 business day before the Commission adopted an order which first designated for hearing the prior application or applications with which such application is in conflict; or (ii) within 60 days after the date of public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing. An application which is substantially amended by a major change (*i.e.*, substantial change as defined by § 1.962(c)) will, for the purpose of this section, be considered to be a newly filed application.

6. In Part 1, § 1.821 is added to read as follows:

§ 1.821 Scope.

Where action on applications is permitted by the Chief, Common Carrier Bureau, under delegated authority, the provisions of this section, including provisions incorporated by reference, shall apply to applications for initial licenses for stations in the Public Land Mobile Service (See Subpart G, Part 22).

7. In Part 1, § 1.822 is added to read as follows:

§ 1.822 Grants by random selection.

(a) Applications in the common carrier services specified in § 1.821 ("Scope") shall be filed, accepted or dismissed, placed on public notice, and subject to Petitions to Deny according to the rules established for the specific service.

(b) If there are mutually exclusive applications for an initial license, the Commission may use a random selection process. Each such random selection shall be conducted under the direction of the Chief of the Common Carrier Bureau. The random selection shall pick a tentative selectee and then repeat the random selection process with the remaining applicants, so that, in the event that the tentative selectee's application is denied, the other applicants will be ranked in order as alternative selectees. Pleadings filed against these applications will not be reviewed prior to conducting the random selection. No preferences shall be awarded to participants. Following the random selection, the Commission shall

announce the tentative selectee and determine whether this applicant is qualified to receive the license. Petitions to Deny and other pleadings properly filed against the selectee's application will be reviewed. If the Commission determines that the tentative selectee is qualified, it shall grant the application. Parties shall not file petitions for reconsideration, motions to stay or applications for review at the time that a tentative selectee is announced. Instead, such pleadings may be submitted at the time when the Commission grants or denies the application. The filing periods specified in the rules shall apply for such pleadings.

8. In Part 1, § 1.823 is added to read as follows:

§ 1.823 Post-selection hearings.

(a) If, after reviewing the selectee's application and pleadings properly filed against it, the Commission determines that a substantial and material question of fact exists, it shall designate the qualifying issue(s) for an expedited hearing.

(b) Expedited hearing procedures.

(i) Hearings may be conducted by the Commission or an Administrative Law Judge. In the case of a question which requires oral testimony for its resolution, the hearing will be conducted by an Administrative Law Judge.

(ii) Parties have ten (10) days from publication in the Federal Register of the hearing designation order to file notices of appearance.

(iii) When the Commission, under § 1.221, issues an order stating the time, place, and nature of the hearing, this order shall instruct the applicant to submit its direct case in writing within thirty (30) days from the order's release date, or as otherwise specified in the order. The direct written case must set forth all those facts and circumstances related to the issues in the designation order. Documentary evidence upon which the applicant relies must be attached. Each exhibit must be numbered and must be accompanied by an affidavit from someone who has personal knowledge of the facts in the submission and who attests to the truth of the submission.

(iv) The order will also specify those petitioners that directly raised an issue which was designated and will inform these parties of their opportunity to submit a written rebuttal case within twenty (20) days after the direct case is due. The procedures in paragraph (iii) will apply as to documentary evidence, exhibits, and affidavits.

(v) Appeal of initial decisions rendered by an Administrative Law Judge shall lie with the Commission.

Subpart F - Private Radio Services Applications and Proceedings

9. In § 1.918, a new paragraph (d) is added and paragraph (d) is redesignated as (e), to read as follows:

§ 1.918 Amendment of applications.

* * * * *

(e) A request to amend an application after it has been designated for random selection pursuant to § 1.972 will be considered only upon written petition addressed to the Chief, Private Radio Bureau and will be granted only for good cause shown. A petition which requests a substantial change in the application or which affects the lottery probabilities of other applicants must be accompanied by a signed statement of a person with knowledge of the relevant facts and must specify with particularity why such change is necessary and whether or not consideration has been promised to or received by the petitioner, directly or

indirectly, in connection with the filing of such petition for amendment. If consideration has been promised or received, the statement shall set forth all the relevant facts with sufficient detail to enable the Chief, Private Radio Bureau to determine whether and to what extent, if any, the consideration represents only the reasonable costs of prosecuting the petitioner's application. Redesignate paragraph (d) as (e).

10. In § 1.953, paragraph (a) is amended to read as follows:

§ 1.953 How applications are processed.

(a) Applications are processed in sequence according to date of filing, or pursuant to the system of random selection prescribed in § 1.972 of this part. Applications which are in accordance with the provisions of this chapter and established policies of the Commission may be processed to completion in accordance with the applicable delegations of authority as set forth in Part O of this chapter.

* * * * *

11. A new § 1.972 is added to read as follows:

§ 1.972 Grants by random selection.

(a) The provisions of this section, including provisions incorporated by reference, may apply to applications for initial licenses:

(i) for stations in the following Private Radio Services: Part 81 - Stations on Land in the Maritime Services Part 87 - Aviation Services

Part 90 - Private Land Mobile Services

Part 94 - Private Operational-Fixed Microwave Service

(ii) In any other proceedings in the Private Radio Services in which the Commission determines that there is no material difference in competing applicants' abilities to serve the public interest.

(b) Applications in the services specified above shall be tendered, filed, accepted or dismissed, publicly noted, and subject to Petitions to Deny in accordance with Section 1.962 and the rules and policies established for each respective service.

(c) If there are mutually exclusive applications for an initial license for stations subject to Part 81 or Part 87, or if there are more applications for initial licenses in Part 90 or Part 94 than can be accommodated on available frequencies, the Commission may process the applications pursuant to a system of random selection. Expedited hearing proceedings may be used to apply comparative criteria in specified radio services to determine which applications will be granted, denied or subject to the random selection. Each such random selection shall be conducted under the direction of the Chief of the Private Radio Bureau. The selection percentages, preferences, and probability calculations prescribed in Section 1.1621 *et seq.* of this part shall not be applicable to any system of random selection conducted in the Private Radio Bureau. Following the random selection, the Commission shall announce the tentative selectee and determine whether the tentative selectee is qualified to receive the license under the rules applicable to the respective service. Where authorized under Section 1.962, Petitions to Deny which have been filed against the tentative selectee before the random selection will be reviewed and processed prior to grant, in accordance with Section 1.962 and those rules applicable to each respective service. If the Commission determines that the tentative selectee has satisfied all requirements, it shall grant the application. If it is determined that an initial tentative selectee is not qualified to receive the license grant, another tentative selectee chosen from among the same applicant pool during the same random selection will be designated until a

qualified applicant is selected. If the Commission determines that a substantial and material question of fact exists, it shall designate the question for hearing. Hearings may be conducted by the Commission or the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge.

* * * * *

12. Section 1.973 is amended to read as follows:

§ 1.973 Designation for hearing.

(a) If the Commission is unable to make the findings prescribed in § 1.971(a) and does not utilize the system of random selection prescribed in § 1.972 of this part, it will formally designate the application for hearing on the grounds or reasons then obtaining and will notify the applicant and all other known parties in interest of such action.

(b) Orders designating applications for hearing will specify with particularity the matters in issue.

(c) Parties in interest, if any, who are not notified by the Commission of its action in designating a particular application for hearing may acquire the status of a party to the proceeding by filing a petition for intervention showing the basis of their interest not more than 30 days after publication in the Federal Register of the hearing issues or any substantial amendment thereto.

(d) The applicant and all other parties in interest shall be permitted to participate in any hearing subsequently held upon such applications. Hearings may be conducted by the Commission or by the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge. The burden of proceeding with the introduction of evidence and burden of proof shall be upon the applicant, except that with respect to any issue presented by a Petition to Deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission or the Chief of the Private Radio Bureau.

* * * * *

13. Subpart L is added to 47 CFR Part 1 to read as follows:

Subpart L - Random Selection Procedures for Mass Media Services

General Procedures

§ 1.1601 Scope.

The provisions of this subpart, including provisions incorporated by reference, shall apply to applications for initial licenses or construction permits or for major changes in the facilities of authorized stations in the following services:

(a) Low Power Television and Television Translator Broadcasting

§ 1.1602 Designation for random selection.

(a) Applications in the services specified in Section 1.1601 shall be tendered, accepted or dismissed, filed, publicly noted and subject to random selection and hearing in accordance with any relevant rules. Competing applications for an initial license or construction permit shall be designated for random selection and hearing in accordance with the procedures set forth below.

§ 1.1603 Conduct of random selection.

(a) Each random selection shall be conducted under the direction of the Chief of the Mass Media Bureau, or his designee.

(b) The random selection probabilities will be calculated in accordance with the formula set out in rules 1.1621–1.1623.

§ 1.1604 Post-selection hearings.

(a) Following the random selection, the Commission shall announce the "tentative selectee" and, where permitted by Section 73.3584 invite Petitions to Deny its application. Following the responsive pleadings thereto, the Commission shall:

(1) in the case of low power television stations, take action pursuant to either rule 73.3591, 73.3592 or 73.3593,

(b) If, after such hearing as may be necessary, the Commission determines that the "tentative selectee" has met the requirements of rule 73.3591(a) it will make the appropriate grant. If the Commission is unable to make such a determination, it shall order that another random selection be conducted from among the remaining mutually exclusive applicants, in accordance with the provisions of this subpart.

(c) If, on the basis of the papers before it, the Commission determines that a substantial and material question of fact exists, it shall designate that question for hearing. Hearings may be conducted by the Commission or, in the case of a matter which requires oral testimony for its resolution, an Administrative Law Judge.

§ 1.1621 Definitions.

(a) Medium of mass communications means

(1) A daily newspaper; and a license or construction permit for

(2) a television (including low power TV or TV translator) station,

(3) a standard (AM) radio station,

(4) an FM radio station,

(5) a direct broadcast satellite transponder under the editorial control of the licensee, and

(6) a cable television system.

(b) Minority group means

(1) Blacks,

(2) Hispanics,

(3) American Indians,

(4) Alaska Natives,

(5) Asians, and

(6) Pacific Islanders.

(c) Owner means the applicant and any individual, partnership, trust, unincorporated association, or corporation which

(1) if the applicant is a proprietorship, is the proprietor,

(2) if the applicant is a partnership, holds any partnership interest,

(3) if the applicant is a trust, is the beneficiary thereof,

(4) if the applicant is an unincorporated association or non-stock corporation, is a member, or, in the case of a nonmembership association or corporation, a director,

(5) if the applicant is a stock corporation, is the beneficial owner of voting shares.

NOTE 1: For purposes of applying the diversity preference to such entities only the other ownership interests of those with a 1% or more beneficial interest in the entity will be cognizable.

NOTE 2: For the purposes of this section, a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

NOTE 3: For the purposes of applying the diversity preference, the ownership interests of the spouse of an applicant's principal will not presumptively be attributed to the applicant.

§ 1.1622 Preferences.

(a) Any applicant desiring a preference in the random selection shall so indicate as part of its application. Such an applicant shall list any owner who owns all or part of a medium of mass communications or who is a member of a minority group, together with a precise identification of the ownership interest held in such medium of mass communications or name of the minority group, respectively. Such an applicant shall also state whether more than 50% of the ownership interests in it are held by members of minority groups and the number of media of mass communications more than 50% of whose ownership interests are held by the applicant and/or its owners.

(b) Preference factors as incorporated in the percentage calculations in Section 1.1623, shall be granted as follows:

(1) Applicants, more than 50% of whose ownership interests are held by members of minority groups - 2:1.

(2) Applicants whose owners in the aggregate hold more than 50% of the ownership interests in no other media of mass communications - 2:1.

(3) Applicants whose owners in the aggregate hold more than 50% of the ownership interest in one, two or three other media of mass communications - 1.5:1.

(c) Applicants may receive preferences pursuant to § 1.1622(b)(1) and either § 1.1622(b)(2) or (b)(3).

(d) Preferences will be determined on the basis of ownership interests as of the date of release of the latest Public Notice announcing the acceptance of the last-filed mutually exclusive application.

(e) No preferences pursuant to § 1.1622(b)(2) or (b)(3) shall be granted to any LPTV applicant whose owners, when aggregated, have an ownership interest of more than 50 per cent in the following media of mass communications, if the service areas of those media as described herein wholly encompass or are encompassed by the protected predicted contour, computed in accordance with Section 74.707(a), of the low power TV or TV translator station for which the license or permit is sought:

(1) AM broadcast station — predicted or measured 2 mV/m groundwave contour, computed in accordance with Sections 73.183 or 73.186;

(2) FM broadcast station — predicted 1 mV/m contour, computed in accordance with Section 73.313;

(3) TV broadcast station — Grade A contour, computed in accordance with Section 73.684;

(4) Low power TV or TV translator station — protected predicted contour, computed in accordance with Section 74.707(a);

(5) Cable television system franchise area, nor will the diversity preference be available to applicants whose proposed transmitter site is located within the franchise area of a cable system in which its owners in the aggregate, have an ownership interest of more than 50 percent.

(6) Daily newspaper community of publication, nor will the diversity preference be available to applicants whose proposed transmitter site is located within the community of publication of a daily newspaper in which its owners, in the aggregate have an ownership interest of more than 50 percent.

§ 1.1623 Probability calculation.

(a) All calculations shall be computed to no less than three significant digits. Probabilities will be truncated to the number of significant digits used in a particular lottery.

(b) Divide the total number of applicants into 1.00 to determine pre-preference probabilities.

(c) Multiply each applicant's pre-preference probability by the applicable preference from Sections 1.1622(b)(2) or (b)(3).

(d) Divide each applicant's probability pursuant to (c) by the sum of such probabilities to determine intermediate probabilities.

(e) Add the intermediate probabilities of all applicants who received a preference pursuant to Sections 1.1622(b)(2) or (b)(3).

(f)(1) If the sum pursuant to (e) is .40 or greater, proceed to subparagraph (g).

(2) If the sum pursuant to (e) is less than .40, then multiply each such intermediate probability by the ratio of .40 to such sum. Divide .60 by the number of applicants who did not receive a preference pursuant to Sections 1.1622(b)(2) or (b)(3) to determine their new intermediate probabilities.

(g) Multiply each applicant's probability pursuant to (f) by the applicable preference ratio from rule 1.1622(b)(1).

(h) Divide each applicant's probability pursuant to (g) by the sum of such probabilities to determine the final selection percentage.

PART 22 - PUBLIC MOBILE RADIO SERVICES

Subpart B - Applications and Licenses

Common Carrier Mobile Service Rules

14. In § 22.23, paragraph (a) is amended to read as follows:

§ 22.23 Amendment of applications.

(a) *Amendments as of right.* A pending application may be amended as a matter of right within 90 days from the filing date of the application, provided that:

(1) Amendments shall comply with § 22.29, as applicable; and

(2) No amendment to an application will be permitted after a Petition to Deny has

been filed unless the amendment responds to all objections raised in all petitions such that any petitions may be dismissed.

15. In § 22.23, paragraph (b) is amended to read as follows:

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing or selected under the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

16. In § 22.28, paragraph (a) is amended to read as follows:

§ 22.28 Dismissal and return of applications.

(a) Except as provided under § 22.29, any application may be dismissed withut prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Requests for dismissal shall comply with the provisions of § 22.29 as appropriate.

17. In § 22.28, paragraph (b) is amended to read as follows:

(b) A request to dismiss an application without prejudice will be considered after designation for hearing only if:

(1) A written petition is submitted to the Commission and is properly served upon all parties of record, and

(2) The petition complies with the provisions of § 22.29 (whenever applicable) and demonstrates good cause.

18. In § 22.28, paragraph (c) is amended to read as follows:

The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to selection under the random selection process, but dismissal may be made with prejudice for unsatisfactory compliance with § 22.29 or after designation for hearing or after selection under the random selection process.

19. In § 22.31, paragraph (b) is amended to read as follows:

(b) An application will be entitled to comparative consideration with one or more conflicting applications (and, in specified services in this Rules Part, included in a random selection process) only if:

* * * * *

20. In § 22.31, paragraph (c) is amended to read as follows:

(c) Whenever three or more applications are mutually exclusive, but not uniformly so, the earliest filed application establishes the date prescribed in paragraph (b)(2) of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application. (For example, applications A, B and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B (or, where applicable, included in the random selection process), C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.)

21. In § 22.31, subparagraph (e)(1) is amended to read as follows:

(1) The application has been designated for hearing under the random selection process, or for comparative hearing, or for comparative evaluation pursuant to § 22.35, and the Commission or the presiding officer accepts the amendment pursuant to § 22.23(b);

* * * * *

22. In § 22.31, subparagraph (e)(4) is amended to read as follows:

(4) The amendment reflects only a change in ownership or control which results from an agreement under § 22.29 whereby two or more applicants entitled to participate in a random selection process join in one or more of the existing applications and request dismissal of their other application(s) to avoid the random selection process.

23. In § 22.32, paragraph (b) is amended to read as follows:

(b) The grant shall be without a formal hearing if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing, and is in accordance with the Commission's rules, regulations, and other requirements;

(2) The application is not subject to a post-random selection hearing or to comparative consideration pursuant to § 22.31 with another application(s), except where the competing applicants have chosen the comparative evaluation procedure of § 22.35 and a grant may be made under that procedure;

* * * * *

24. In § 22.32, paragraph (e) is amended to read as follows:

(e) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented;

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete, and in accordance with the Commission's rules, regulations, and other requirements.

25. In § 22.32, paragraph (f) is amended to read as follows:

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) or Part I of this chapter.

26. In § 22.32, paragraph (g) is amended to read as follows:

(g) Whenever the public interest would be served, the Commission may grant one or more mutually exclusive applications expressly conditioned upon final action on the applications, and then either conduct a random selection process (in specified services under this Rules Part), or designate all mutually exclusive applications for a formal evidentiary hearing or (whenever so requested) follow the comparative evaluation procedures of § 22.35, as appropriate, if it appears:

* * * * *

27. In § 22.35, paragraph (a) is amended to read as follows:

§ 22.35 Comparative evaluation of mutually exclusive applications.

(a) In order to expedite action on mutually exclusive applications, in services under this Rules Part where the random selection process does not apply, the applicants may request the Commission to consider their applications without a formal hearing in accordance with the summary procedure outlined in paragraph (b) of this section, if:

* * * * *

28. In Part 22, § 22.525 is added to read as follows:

§ 22.525 Grants by random selection.

(a) If a properly filed application for an initial license in the Public Land Mobile Service is mutually exclusive with another such application, the applicants shall be included in the random selection process set forth in Part I, §§ 1.821 *et seq.* No preferences shall be awarded. Renewal applications shall not be included in a random selection process.

Part 73 *RADIO BROADCAST SERVICES*

Subpart H - *Rules Applicable in Common to Broadcast Stations*

29. Part 73 is amended by adding a new § 73.3521 to read as follows:

§ 73.3521 Mutually exclusive applications for low power television and television translator stations. When there is a pending application for a new low power television or television translator station, or for major changes in an existing station, no other application which would be directly mutually exclusive with the pending application may be filed by the same applicant or by any applicant in which any individual in common with the pending application has any interest, direct or indirect, except that interests of less than 1% will not be considered.

30. In § 73.3522, paragraph (a) is amended to read as follows:

§ 73.3522 Amendment of applications.

(a) Predesignation amendment.

(1) Subject to the provisions of §§ 73.3525, 73.3571, 73.3572, 73.3573 and 73.3580, and except as provided in (2) of this paragraph, any application, other than an application for a low power TV or TV translator station, may be amended as a matter of right prior to the adoption date of an order designating such applications for hearing, merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with § 73.3513. If a petition to deny (or to designate for hearing) has been filed, the amendment shall be served on the petitioner.

(2) Subject to the provisions of §§ 73.3525, 73.3571, 73.3572, 73.3573, and 73.3580, and except for applications for low power TV or TV translator stations, mutually exclusive broadcast applications may be amended as a matter of right by the date specified (not less than 90 days after publication) in FCC's public notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent applications prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to §§ 1.65 or 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

(3) Subject to the provisions of Sections 73.3525, 73.3572 and 73.3580, and except as provided in (4) of this paragraph, any application for low power TV and TV translators may be amended at any time.

(4) No applicant for a low power TV and TV translator station which is mutually exclusive can improve its status with respect to Section 1.1622 by amendment of its application subsequent to the release of the initial Public Notice announcing the public lottery that will resolve the applicant's mutually exclusivity pursuant to Sections 1.1601 *et seq.*, notwithstanding the requirements of Section 1.65.

(5) Subsection (b) and (c) of this paragraph are not applicable to applications for low power TV and TV translator stations.

* * * * *

31. In § 73.3564, paragraph (c) is revised to read as follows:

§ 73.3564 Acceptance of applications.

* * * * *

(c) At regular intervals the FCC will issue a Public Notice listing all applications and major amendments thereto which have been accepted for filing. Pursuant to § 73.3571(c), 73.3572(c), and 73.3573(d), such notice shall establish a cut-off date (not less than 30 days from the date of issuance) for the filing of mutually exclusive applications and, except in the case of low power TV and TV translator applications, Petitions to Deny. However, no application will be accepted for filing until a statement establishing compliance with the local notice requirements of § 73.3580 has been received by the FCC.

32. In § 73.3572, paragraphs (c), (d) and (e) are revised and a new (f) is added to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, and TV translator station applications.

* * * * *

(c) Applications for TV stations, other than low power TV and TV translator stations, will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and petitions to deny the listed applications must be filed.

(d) Except for applications for low power TV and TV translator stations, regardless of the number of applications filed for channels in a city or the number of assignments available in that city, those applications which are mutually exclusive, *i.e.*, which request the same channel, will be designated for hearing. All other applications for channels will, if the applicants are duly qualified, receive grants. For example, if Channels 6, 13, 47, and 53 have been assigned to City X and there are pending two applications for Channel 6 and one application for each of the remaining channels, the latter three applications will be considered grants without hearing and the two mutually exclusive applications requesting Channel 6 will be designated for hearing. If there are two pending applications for Channel 6 and two applications for Channel 13, separate hearings will be held.

(e) Where applications, other than applications for low power TV and TV translators stations, are mutually exclusive because the distance between the respective proposed transmitter sites is contrary to the station separation requirements set forth in § 73.610, such applications will be processed and

designated for hearing at the time the application with the lower file number is reached for processing. In order to be considered mutually exclusive with a lower file number application, the higher file number application must have been accepted for filing at least one day before the lower file number application has been acted upon by the FCC.

(f) Processing of applications for low power TV and TV translator stations.

(1) Applications for low power TV and TV translator stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications must be filed.

(2) Subsequently, the FCC will release a Public Notice: (i) establishing a date, time, and place for a public lottery; (ii) accepting for filing previously unaccepted applications which are mutually exclusive with those applications accepted on the previous Public Notice; (iii) designating the listed mutually exclusive applications for public lottery pursuant to the procedures set forth in Sections 1.1601 *et seq.*; and (iv) describing each applicant's certified preferences and selection probabilities and assigning to each applicant a number block. (It will be the applicant's responsibility to notify the Commission, within 30 days of the release of the Public Notice, of any omissions of applications or clerical or mathematical errors in preferences or probabilities. The Commission will not entertain appeals involving these matters if timely notification to the Commission has not been made.) If necessary, the FCC will release subsequent (not less than 30 days after the release of the Public Notice initially announcing the lottery) Public Notices correcting any clerical or mathematical errors and including any previously omitted mutually exclusive applications. The public lottery pursuant to the procedures set forth in Section 1.1601 *et seq.*, will be held no less than 30 days subsequent to the last released Public Notice, whether initial or corrected, announcing the lottery. Subsequent to the lottery, the FCC will release a Public Notice announcing the selection of a tentative selectee resulting from the lottery and providing an opportunity for the filing of Petitions to Deny pursuant to the requirements of Section 73.3584(c). If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of a tentative selectee's application, the same will be granted. Those applications which, due to the lottery, are no longer mutually exclusive with other applications will be announced in a Public Notice proposing the grant of those applications and providing an opportunity for the filing of Petitions to Deny pursuant to Section 73.3584(c). Groups of mutually exclusive applicants remaining after a lottery will be designated for lottery. Applications which are not grantable due to mutually exclusivity with the permittee selected by lottery will be dismissed.

(3) If, upon examination, the FCC is unable to find that the public interest, convenience and necessity will be served by the granting of a lottery tentative selectee's application, and it appears that a hearing may be required, the procedure set forth in Section 73.3593 will be followed. No further action will be taken with reference to the other applications in the lottery group from which the tentative selectee was selected until the tentative selectee's qualifications to be a permittee are resolved. If the tentative selectee is ultimately found to be unqualified to be a permittee, the procedure set forth in subparagraph (f)(2) above will be followed.

(4) The FCC will periodically release a Public Notice proposing for grant those applications which have previously appeared on a Public Notice, but which are not mutually exclusive with any other application, and providing an opportunity for the filing of Petitions to Deny pursuant to Section 73.3584.

NOTE 1: Notwithstanding subparagraph (f)(1) and § 73.3522(a)(3), applications for low power TV and TV translator stations will be processed within the tiered processing framework as set forth in *Notice on Interim Processing*, 45 Fed. Reg. 62004 (published September 17, 1980), *Order Imposing Freeze*, 46 Fed. Reg. 26062 (published May 11, 1981) and *Report and Order in the Matter of Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 47 Fed. Reg. 21468 (published May 18, 1982).

NOTE 2: Pursuant to Section 73.3584(c), the Commission may announce, by the Public Notice designating the applications for public lottery, that a Notice of Petition to Deny will be required to be filed no later than 30 days after issuance of the Public Notice.

33. Section 73.3584 is revised to read as follows:

§ 73.3584 Petitions to Deny.

(a) Except in the case of applications for new low power TV or TV translator stations or for major changes in the existing facilities of such stations, any party in interest may file with the Commission a Petition to Deny any application (whether as originally filed or if amended so as to require a new file number pursuant to §§ 73.3571(j), 73.3572(b), 73.3573(b), 73.3574(b) or 73.3578) for which local notice pursuant to § 73.3580 is required, provided such petitions are filed prior to the day such applications are granted or designated for hearing; but where the FCC issues a public notice pursuant to the provisions of §§ 73.3571(c), 73.3572(c) or § 73.3573(d), establishing a "cut-off" date, such petitions must be filed by the date specified. In the case of applications for transfers and assignments of construction permits or station licenses, Petitions to Deny must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the application. In the case of applications for renewal of license, Petitions to Deny may be filed at any time up to the last day for filing mutually exclusive applications under § 73.3516(e). Requests for extension of time to file Petitions to Deny applications for new broadcast stations or major change in the facilities of existing stations or applications for renewal of license will not be granted unless all parties concerned, including the applicant, consent to such requests, or unless a compelling showing can be made that unusual circumstances make the filing of a timely petition impossible and the granting of an extension warranted.

(b) Except in the case of applications for new low power TV or TV translator stations, or for major changes in the existing facilities of such stations, the applicant may file an opposition to any Petition to Deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in § 1.45 except that as to a Petition to Deny an application for renewal of license, an opposition thereto may be filed within 30 days after the Petition to Deny is filed, and the party that filed the Petition to Deny may reply to the opposition within 20 days after the opposition is due or within 20 days after opposition is filed, whichever is longer. The failure to file an opposition or a reply will not necessarily be construed as an admission of any fact or argument contained in a pleading.

(c) In the case of applications for new low power TV or TV translator stations, or for major changes in the existing facilities of such stations, any party in interest may file with the Commission a Petition to Deny any application (whether as originally filed or if amended so as to require a new file number pursuant to

Section 73.3572(b)) for which local notice pursuant to Section 73.3580 is required, provided such petitions are filed within 15 days of the FCC Public Notice proposing the application for grant (applicants may file oppositions within 15 days after the Petition to Deny is filed); but where the Commission selects a tentative permittee pursuant to § 1.1601 *et seq.*, Petitions to Deny shall be accepted only if directed against the tentative selectee and filed after issuance of and within 15 days of FCC Public Notice announcing the tentative selectee. The applicant may file an opposition within 15 days after the Petition to Deny is filed. In cases in which the minimum diversity preference provided for in Section 1.1623(f)(1) has been applied, an "objection to diversity claim," and oppositions thereto, may be filed against any applicant receiving a diversity preference, within the same time period provided herein for Petitions and oppositions. In all pleadings, allegations of fact or denials thereof shall be supported by appropriate certification. However, the Commission may announce, by the Public Notice announcing the acceptance of the last-filed mutually exclusive application, that a notice of Petition to Deny will be required to be filed no later than 30 days after issuance of the Public Notice.

(1) If so announced, a Petition to Deny filed against an applicant will not be accepted if filed by a party which failed to timely file a notice of petition, and make service of the notice of petition pursuant to Section 1.47, unless good cause is shown for the failure to file the notice. Good cause includes allegations based on facts that could not previously be discovered with diligence, and fraud or suppression of evidence by the tentative selectee.

(2) The notice of Petition to Deny shall be limited to two pages. The notice shall include specific allegations that concisely state the reasons why the applicant lacks the qualifications to be a licensee or why a grant of the application would be inconsistent with the public interest. The notice shall be supported by certification made by a person or persons having personal knowledge thereof.

(d) Untimely Petitions to Deny, as well as other pleadings in the nature of a Petition to Deny, and any other pleadings or supplements which do not lie as a matter of law or are otherwise procedurally defective, are subject to return by the FCC's staff without consideration.

34. In § 73.3591, paragraph (b) is revised to read as follows:

§ 73.3591 Action on applications.

* * * * *

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the FCC will not consider any other application, or any application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete, or, in the case of low power TV and TV translator stations, complete and sufficient, and tendered for filing by:

(1) the close of business on the day preceding the day designated by Public Notice as the day the listed application is to be available and ready for processing; or

(2) the date prescribed in § 73.3516(e) in the case of applications which are mutually exclusive with applications for renewal of license of broadcast stations.

* * * * *

35. In § 73.3597, paragraphs (a)(1) and (a)(2), (b)(1) and (c)(1) are revised to read as follows:

§ 73.3597 Procedures on transfer and assignment applications.

(a) * * * * *

(1) The permit or license was not authorized after a comparative hearing or, in the case of low power TV and TV translator stations, the permit or license was not authorized after a lottery in which the permittee or licensee benefited from minority or diversity preferences;

(2) The application involves an FM translator station or FM booster station only;

* * * * *

(b)(1) The commencement date of the one-year period set forth in paragraph (a) of this section shall be the date on which the station initiated program tests in accordance with § 73.1620 or § 74.14.

* * * * *

(c)(1) As used in paragraphs (c) and (d) of this section:

(i) "Unbuilt station" refers to an AM, FM, or TV broadcast station or a low power TV or TV translator station for which a construction permit is outstanding, and, regardless of the stage of physical completion, as to which program tests have not commenced or, if required, been authorized.

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PART 81 *STATIONS ON LAND IN THE MARITIME SERVICES*

36. In Part 81, a new § 81.51 is added to read as follows:

§ 81.51 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

* * * * *

PART 87 *AVIATION SERVICES*

37. In Part 87, a new Section 87.48 is added to read as follows:

§ 87.48 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

* * * * *

PART 90 *PRIVATE LAND MOBILE RADIO SERVICES*

38. Section 90.143 is amended to read as follows:

§ 90.143 Grants of applications.

(b) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission; provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

Redesignate paragraph (b) as (c).

* * * * *

PART 94 *PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICES*

39. In § 94.37, a new paragraph (c) is added to read as follows:

§ 94.37 Grant of application without hearing.

* * * * *

(c) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission; provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

* * * * *

SEPARATE STATEMENT OF CHAIRMAN MARK S. FOWLER
Re: Lottery Procedures
March 31, 1983

I applaud the effort of Congress to empower the Commission to employ a lottery to alleviate the Commission's processing and adjudication burdens and the accompanying delay that selecting among many competing applicants for broadcast or other licenses engenders. A lottery method of selection can assist in the inauguration of new telecommunications services that might otherwise be subject to interminable delay. I would have desired, however, that the lottery system authorized by Congress have offered all qualified license applicants an equal opportunity for success. A nondiscriminatory lottery is not only vastly easier to administer than the skewed lottery architected by Congress, but also reflects a paramount aspiration of this Nation: equal justice or opportunity for all persons under the law. I unequivocally oppose relying on the color of a person's skin to determine whether special preferences should be awarded in seeking communications licenses through a lottery system. The tragic history of race relations in the United States naturally elicits enormous sympathy for those who in the past have suffered grievously on account of race. But this sympathy should not blind us to the constitutional questions raised by the minority preference system and to the unhappy policy implications of enshrining racial preferences into law.

The decisions in *University of California Regents* v. *Bakke* [1] and *Fullilove* v. *Klutznick* [2] established standards by which to test the constitutional validity of a lottery that prefers minority applicants. First, findings must have been made that discrimination existed in a particular industry. Second, a remedial program must be narrowly

[1] 438 U.S. 265 (1978).
[2] 448 U.S. 448 (1980).

tailored to remedy the effects of that past discrimination without excluding other innocent groups from the opportunity to participate in the relevant field. Third, the program must be subject to continuing oversight to assure that it will cause the least possible harm to innocent third parties.

Bakke established the proposition that preferences for minorities may be used only where there have been "judicial, legislative, or administrative findings" of specific instances of discrimination in the field in issue.[3] "Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another,"[4] for there could be no showing of a compelling justification for inflicting competitive disadvantages on innocent individuals.

In *Fullilove*, the Court approved a preferential program for public works contracting but only because Congress had made findings on the basis of "abundant evidence . . . that minority businesses have been denied effective participation in public contracting opportunities . . . ."[5] The absence of any similar findings with respect to the broadcast industry is arguably fatal to the Commission's preferential program. It is clear from the *Bakke* decision that evidence of past discrimination in society at large is insufficient to justify the imposition of an affirmative action program.[6]

There have been no Congressional findings of illegal discrimination in the communications field. In the Conference Report accompanying the Communications Amendment Act of 1982, the Conference Committee made findings that minority goups were "significantly underrepresented in the ownership of telecommunications facilities."[7] Congress, however, omitted any findings that attributed this underrpresentation to illegal discrimination by either governmental or private parties. Underrepresentation in an industry or profession, *simpliciter*, cannot justify racial preferences. *See Bakke* at p. 302.

Even if there had been findings that illegal discrimination in the communications industry had handicapped some minorities in competing for broadcast licenses, the remedy created by the Congress would still be of questionable legitimacy. Central to the Court's holding in *Fullilove* was the doctrine that the preference accorded to minorities must be equivalent to the extent of the past discrimination. Congress, however, has awarded minorities a 2. to 1 lottery preference without findings that this degree of preference accurately reflects the amount of the handicap that might be attributed to putative past discrimination. The preferences awarded

[3] *Bakke, supra*, at p. 307.
[4] *Ibid*, at p. 309.
[5] *Fullilove, supra*, at p. 477.
[6] *Ibid*, at p. 307.
[7] H. Rep. No. 97–765, 97th Cong. 2nd Sess. (1982) ("Conference Report") at p.45.

extend to all minority applicants, whether or not the applicant has substantial resources or enjoyed the same or better educational or other opportunities compared to a non-preferred applicant.

An affirmative action remedy must be tailored to correspond to the extent of injury traceable to past illegal discrimination, and must be subject to continuing oversight to ensure that it will do the least possible harm to innocent persons disadvantaged thereby.[8] The statute upheld in *Fullilove*, for example, set a goal of devoting 10% of each public works grant to minority businesses, but provided that bids from minorities above ordinary competitive levels need only be entertained to the extent they reflect "costs inflated by the present effects of prior disadvantage and discrimination."[9] With regard to the "continuing oversight requirements," the Communications Amendments Act of 1982 is silent.[10] The program challenged in *Fullilove* was a one-time program, and there was consequently no need for continuing oversight. The lottery preferences, in contrast, can be employed indefinitely, and some type of meaningful oversight would seem to be required to justify a racial classification.

Because the preferential program adopted today impinges on the civil rights of innocent individuals on account of race, I believe it to be constitutionally unsound. I believe that whenever the courts, Congress, or this Commission diverge from a norm of color-blindness, there must be a compelling reason, for, as Justice Stevens has noted, "classifications based on race are potentially so harmful to the entire body politic."[11] No compelling reason animated Congress to etch racial preferences into the lottery system.[12] Too often in our history, policymakers and the courts have caused adverse social repercussions by making ill-advised decisions in matters of race.[13] Indeed, as Justice Stevens further observed, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals."[14]

The victims of the minority preference system are innocent non-preferred persons who are denied equal opportunity to compete for a Commission license. It seems to me that history has demonstrated that when race, class or caste are officially sanctioned as reasons for

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[8] *Bakke*, *supra*, at pp. 308–309.

[9] *Fullilove*, *supra*, at p. 481.

[10] A statement in the Conference Report directs the Commission to furnish annual reports on the effect of § 309(i)(3) (Conference Report at p. 45). The minority preferences, however, do not terminate even if underrepresentation by minorities in broadcasting is overcome.

[11] *Fullilove*, *supra*, at p. 534 (Stevens, J. dissent).

[12] Congress seemingly assumed that diversity of broadcast programming would be advanced by increasing broadcast ownership by minorities. There is not a scintilla of evidence based on experience or otherwise to support this assumption.

[13] *See Dred Scott* v. *Sanford*, 60 U.S. (19 How) 393 (1857); the *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[14] *Fullilove*, *supra*, at p. 534 n. 4 (Stevens, J. dissent).

denying equal opportunity, then a principle has been established that threatens to deny equal opportunity for everyone. As Justice Jackson so eloquently put it in *Korematsu* v. *U.S.*,[15] the principle lies around like a loaded weapon ready to be used by persons who claim an urgent need.

To diverge from a norm of color blindness is to foster racial antagonism[16] and to denigrate individual liberty. While some commentors have suggested that to get beyond racism, the country must employ racist means,[17] I believe that viewpoint is utterly irreconciliable with American ideals of equal civil rights. Four score and seven years ago, Justice Harlan urged a constitutional norm of color-blindness that history has applauded: "In respect to civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved."[18] Events at home and abroad since Justice Harlan delivered his memorable words substantiate their ageless wisdom.

I wish to make it clear that these views should not be interpreted as a weakening of my commitment to increasing the participation of minorities in broadcasting through nondiscriminatory means.[19]

I also disagree with another aspect of the lottery order: namely, the Commission's determination to bar newspapers from eligibility for a diversity preference. The statutory provision relating to lotteries requires that certain preferences be accorded when a lottery is used to grant licenses for any medium of mass communication. One of the preferences to be awarded is a diversity preference, meant to encourage divergent sources of programming and information. The preference applies to applicants who control less than four other media of mass communications. The statute provides that the "term 'media of mass communication' includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, *the licensed facilities of which* may be substantially devoted toward providing programming . . ."[20] Because newspapers are not licensed, it is clear that the Congress did not intend that they be deemed a medium of mass communications. In addition, the other media listed differ in type from newspapers in that they utilize the electromagnetic spectrum.

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[15] 323 U.S. 214, 246 (1944) (Jackson, J. dissent).

[16] *Anderson* v. *Martin*, 375 U.S. 399 (1964).

[17] *Bakke, supra*, at p. 407 (Blackmun, J. dissent).

[18] *Plessy v. Ferguson*, 163 U.S. 537, 554 (Harlan, J. dissent) (1896).

[19] I also believe it is my duty to administer faithfully the lottery statute enacted by Congress despite my doubts as to its constitutionality.

[20] 47 U.S.C. § 309(I)(3)(c)(i) (emphasis supplied).

My fellow commissioners rely on language in the Conference Report[21] to support their view that newspapers are to be included within the definition of mass media. The fact that the Conference Report mentions newspapers when the statute is silent with respect to them argues in favor of a contrary conclusion, for it makes clear that consideration went into the question of whether newspapers should be included within the definition of mass media, and that Congress did not vote affirmatively in favor of inclusion. The use of a Conference Report to supercede the meaning of an unambiguous statute is inappropriate[22], for it is a fundamental canon in matters of statutory construction that "legislative purpose is expressed by the ordinary meaning of the words used."[23]

As a matter of policy, I also believe it to be unsound to prevent newspapers from obtaining a diversity preference in obtaining an LPTV license. Newspapers can be an invaluable source of equity capital and management talent, as was demonstrated in the early history of radio and television stations, where newspapers played a substantial role in underwriting local television stations. It is also in the national interest to allow newspapers to diversify their financial investments. Congress acknowledged the importance of preserving newspapers as viable means of communication in the Newspaper Preservation Act[24] and to prejudice their ability to communicate through the medium of LPTV is antithetical to the motives that spurred the passage of that Act.

The argument advanced in support of the Commission's position - that diversity in mass media will be furthered by the Commission's yolking newspapers within the ambit of mass media - is twice flawed. First, it means that the diversity demerit would be imposed on a newspaper in San Francisco if it applied for an LPTV station in Omaha. Such a combination would clearly not impair diversity, because San Francisco newspapers do not penetrate the Omaha market, and an Omaha LPTV station would not compete in the San Francisco market. Secondly, th diversity of views championed by the First Amendment and public interest considerations has both a quantitative and qualitative aspect. A reasonable number of varying views are required to stimulate edifying political or other discourse. But such discourse will be impoverished without concern for the

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[21] Conference Report at p. 41.

[22] *Caminetti* v. *U.S.*, 242 U.S. 470, 490 (1917).

[23] *Richards* v. *U.S.*, 369 U.S. 1, 9 (1962).

The Representatives and Senators who voted on the lottery statute were entitled to rely on the text of the statute and not the Conference Report in determining how to vote. Similarly, when the President deliberated as to whether to sign the bill, he could assume that the unambiguous statutory language controlled.

[24] 15 U.S.C. § 1801.

quality of viewpoints expressed. As Alexander Meiklejohn observed[25], it is more important that everything worth saying shall be said than that everyone shall speak. To allow newspapers to own LPTV stations would increase the quality and richness of views received by the audience and thereby further diversity concerns. A rigid insistence on maximizing the gross number of different viewpoints at the expense of all other First Amendment values is contrary to the public interest.

March 31, 1983

CONCURRING STATEMENT OF COMMISSIONER ANNE P. JONES

In Re: Second Report and Order in General Docket No. 81–768: Use of Lotteries to Select Certain Initial Radio Licensees

Since the rules and procedures established by this Report and Order are intended to speed authorization of service and may have that effect, I concur. I do so, however, with substantial reservations of which I will mention only a few.

First, it seems to me these rules and procedures could and should be simpler, shorter, and better designed for their intended purpose. For example, I believe Commissioner Rivera is correct that the preference scheme adopted out of deference to the Conference Report may not in all circumstances result in the "significant preferences" for under-represented persons and groups mandated by the statute. If experience demonstrates that a different scheme is needed to achieve the statutory purpose, I hope the Commission will adopt it on the premise that the statute and not the Conference Report is the law of the land.

Second, I believe the flood of applications being received in the cellular mobile radio service is demonstrating that the Commission may have erred in excluding that service from this proceeding. If we are to avoid a licensing debacle in cellular comparable to that which already exists in low power television, we should promptly move toward use of the lottery mechanism to choose from among competing qualified cellular applicants.

Third, I am distressed that the Commission did not give serious consideration in this proceeding to the possibility of granting "significant preferences" to women. On this point, I note that the evidence cited by Commissioner Dawson clearly indicates that women are "applicants . . . the grant to which of [a mass media] license or permit would increase the diversification of ownership of the media of mass communications." Hence they should be granted a preference and may well also qualify for the "additional significant

[25] Meiklejohn: Political Freedom, 26 (1948), quoted in *CBS* v. *Democratic Nat'l. Committee* 412 U.S. 94, 122 (1973).

preference" which under the statute "shall be granted to any applicant controlled by a member or members of a minority group."

With these reservations and some others, I concur in issuance of this Report and Order in the hope that it will be only the first step in establishment of a fair, efficient, and simple mechanism for speeding authorization of needed telecommunications service by choosing by random from among competing qualified applicants for radio licenses. I look forward to the next step.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

To the extent preferences have been enacted into law and to the extent those preferences appear to be based on underrepresentation in broadcast ownership, I believe that a preference for female ownership should also be given in cases involving lotteries.

First, it seems clear that the preferences awarded by the lottery statute are based on traditional underrepresentation in broadcast ownership. As the legislative history of the lottery statute says, preferences are awarded because the

> Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.

Conference Report at 43.

In addition, it seems obvious that women are seriously underrepresented in the ownership of broadcast stations. A May 1982 study prepared for the Commission by ELRA Group, Inc. estimates that only 2.8 per cent of television stations, 8.6 per cent of AM stations and 9 per cent of FM stations are owned[1] by women. And 50 per cent of the female owners of AM stations, 43 per cent for FM stations and 27 per cent for TV stations are the wives of other owners. Since women comprise more than 51 per cent of the population, it is clear that they are significantly underrepresented in the ownership of broadcast stations, and, in fact, the legislative history of the lottery statute notes that women are "significantly underrepresented in the ownership of telecommunications facilities." *Conference Report* at 44–45.[2]

I understand that the statute and its legislative history are not entirely clear on the inclusion of women in the preference scheme.

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[1] The study uses majority ownership (i.e., 50 per cent or more) as the bench mark for "ownership."

[2] In apparent recognition of this the Commission has begun to include in comparative cases some preference, if not a well-defined one, for female ownership. *E.g.*, Waters Broadcasting Corp., 91 F.C.C.2d 1260, 52 Rad. Reg.2d (P&F) 1063, 1069 (1982) ("substantial enhancement for minority and female ownership").

For example, the statute itself states that the minorities for whom preferences are designed "include" certain enumerated groups. *See Conference Report* at 10. Thus, the language does not appear to preclude additions to the enumerated groups.[3] Moreover, the legislative history states that underrepresented groups such as women

> would, of course, be eligible for both media ownership and minority ownership preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lottery preference scheme, and, consequently, the American public will benefit by having access to a wider diversity of information sources.

Conference Report at 45. To me, this suggests that the Commission could include a preference for female ownership if it chose to to do.

However, because of the apparent confusion in the statute and its legislative history, I welcome the notice seeking comment on the Commission's authority to extend the minority preference to include women as well as the letter to Congress noting this confusion. I will look forward to the early issuance of these documents as well as the documents in the notice proceeding.

STATEMENT OF OF COMMISSIONER HENRY M. RIVERA DISSENTING IN PART

RE: Use of Lotteries to Select Certain Initial Licensees

I dissent from the majority's decision to grant a diversity preference to those who own a full power television station (and no more than three media outlets) in all cases except when the LPTV station applied for is encompassed by or encompasses the Grade A contour of the full service station.[1] That approach defies Congress' intent to foreclose applicants who own a medium of mass communications in the same market as the facility being applied for from obtaining a diversity preference. Congress' wishes on this point are strong and quite specific:

> The Conferees strongly believe that the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in

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[3] For example, the United States Court of Appeals for the Eighth Circuit has construed similar language in a bankruptcy statute. There, the court found that the statute at issue used

> the word "includes" when setting out the types of organizations that come within the definition rather than the word "means." When a statute is phrased in this manner, the fact that the statute does not specifically mention a particular entity (in this case labor unions) does not imply that the entity falls outside of the definition.

Highway & City Freight Drivers v. Gordon Transports, Inc., 567 F.2d 1285, 1289 (8th Cir. 1978) (footnote ommitted).

[1] *See Second Report and Order* para. 77 n. 34.

the licensing process. Where an applicant for a license or permit has controlling interest (over 50 percent) in any other medium of mass communications which would be co-located with the licensed facility sought, it would not promote diversity to give such an applicant a preferred status relative to other applicants.[2]

Congress precluded local media owners from obtaining a diversity preference to promote the spirit of our existing duopoly, one-to-a-market and other crossownership rules; while not limiting a media owner's right to apply for, or obtain, a low power television license in its community of license, it is quite clear that Congress did intend to prevent such applicants from being preferred in any lottery.

The majority quite simply ignored this congressional purpose by adopting a Grade A encompassment standard for full power television stations. Under this standard, the owner of an urban full power television station seeking an LPTV station in its suburban service area will now be eligible for a diversity preference (so long as that owner does not own more than three media outlets). And, under the congressionally imposed multiplier scheme, such an applicant's chances of winning can be further increased if the forty percent collective minimum diversity advantage has not been achieved. The net effect of the Grade A encompassment standard adopted will be to undermine, not promote, the goal of local diversification, directly contrary to congressional intent. The majority should have used the Grade B contour duopoly standard now embodied in the rules[3] to govern the preference eligibility of television station owners applying for nearby LPTV stations.

Apart from this issue, I would also note two problems I hope the Congress will remedy during its first annual review of this legislation.

I am extremely troubled by the fact that the preference scheme we have adopted, while faithful to the narrow directives of the legislative history of Section 309(i) as amended, will not in practical effect accord with the statutory mandate to award a "significant preference" to applications that are minority-owned or controlled. The procedures we have fashioned here give new meaning to the word "significant" as far as preferences for minority ownership are concerned. Unlike the diversity preference, the statistical advantage given for minority ownership is a relative one. Thus, the larger the pool of applicants in a given lottery, the smaller the preference to minority eligibles. Indeed, because of the hugh number of applications that will be involved in most LPTV lotteries, *de minimus* "preferences" will be the rule rather than the exception as far as

[2] H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982).
[3] See 47 C.F.R. § 73.636(a)(1).

minority ownership is concerned. This situation not only flies in the face of the *Report and Order* authorizing LPTV,[4] which set advancement of minority ownership as a primary goal, but the plain language of Section 309(i)(3)(A) as well. Congressional review of this condition is, therefore, imperative.

I also hope that Congress sees fit to alter its standard governing limited partnerships, which is at variance with FCC treatment of limited partnerships in the tax certificate context.[5] Both the tax certificate policy and the lottery legislation are designed to promote minority ownership of telecommunications facilities; I can think of no reason standards applicable to limited partnerships should differ between the two programs.

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[4] *See Report and Order Authorizing Low Power Television Service*, 47 Fed. Reg. 21468 (released May 18, 1982).

[5] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, FCC 82–523 (released December 13, 1982).

Appeal, Denied
Application, Amendment of, Engineering Change
Review by Review Board
Site Availability

Review Board denied appeal and affirmed ALJ's denial of a comparative broadcasting applicant's petition for leave to amend its transmitter site. Applicant's failure to amend within 20 months from vitiation of the reasonable assurance of its original site demonstrated extreme lack of diligence, was disruptive of the hearing, and prejudicial to the other parties.
–*Shoblom Broadcasting, Inc.*
BC Docket No. 82–135

FCC 83R–27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SHOBLOM BROADCASTING, INC. Yucca Valley, California	BC Docket No. 82–135 File No. BPH-800813AA
Deanne C. Davis, John J. Davis, Sammy L. Fields, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY Yucca Valley, California	BC Docket No. 82–136 File No. BPH-800825AG
BUENA VISTA BROADCASTING COMPANY Yucca Valley, California	BC Docket No. 82–137 File No. BPH-800827AA
DESERT RADIO, INC. Yucca Valley, California	BC Docket No. 82–139 File No. BPH-800829AI
ROYCE INTERNATIONAL BROADCASTING COMPANY Desert Hot Springs, California	BC Docket No. 82–140 File No. BPH-800829AO
For Construction Permit for a New FM Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted:April 15, 1983: Released:April 22, 1983.)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications were designated for a comparative hearing by Hearing Designation Order, Mimeo No. 2690, 47 Fed. Reg. 12855, published March 25, 1982, which included a Section 73.315 signal coverage issue against Royce International Broadcasting Company (Royce). On October 22, 1982, Royce filed a petition for leave to amend to specify a change of transmitter site and to supply a supporting engineering showing. By Memorandum Opinion and Order, FCC 83M-395, released February 1, 1983, presiding Administrative Law Judge Frederic J. Coufal (ALJ) denied the Royce petition. Now before the Review Board are Royce's appeal of this denial and an opposition filed by Corinthians XIII Broadcasting Company (Corinthians).[1] We shall affirm the ALJ's Order because we agree that good cause for filing the amendment at this late date has not been shown.

2. In his Order, the ALJ applied the established six-point test of good cause for postdesignation amendments set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970):

> . . . the moving party must demonstrate that it acted with due diligence, that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

In particular, he found that Royce was not diligent in its efforts to obtain a viable transmitter site, that acceptance of the amendment would require changes in the hearing issues and additional hearing,[2] and that the other parties had been prejudiced by having to address three different transmitter site proposals by Royce involving three different engineering showings and by the resulting delays in the timely completion of the proceeding.

3. Royce asserts in its appeal that it did not learn that the U.S. Department of the Interior "no longer approved" Royce's originally-proposed transmitter site at Eureka Park, California (within Joshua Tree National Monument) until after it filed its application on August 29, 1980, and that what followed were "persistent efforts to

[1] Permission to appeal the Order, required by Section 1.301(b) of the Commission's Rules, 47 CFR § 1.301(b), was granted by the ALJ in FCC 83M-531, released February 11, 1983.

[2] The ALJ conducted hearings with respect to issues other than signal coverage and site related matters in November 1982.

secure a suitable transmitter site, culminating in its October 22, 1982 petition for leave to amend." Royce Br. at 1.[3] It argues that a proposed settlement agreement among the other four applicants reduces this proceeding "to a two-party contest," and urges that, "in view of the public interest policy favoring maximum choice among qualified applicants," good cause for accepting the amendment was shown. *Id.* at 1–2. Royce also maintains that no modification or addition of issues would be necessitated by its amendment because any changes may be explored under already designated issues. *Id.* at 3. Finally, it claims that, in denying its petition for leave to amend, the ALJ prejudged the Section 307(b) choice-of-community and contingent comparative issues by implying that Royce's Desert Hot Springs proposal could not be granted because it does not place a 60 dBu signal contour over Yucca Valley. *Id.* at 4.

4. We agree with Corinthians and the ALJ that Royce has not shown good cause for its October 22, 1982 amendment. Initially, we find that Royce was far from diligent in locating and amending to specify a suitable transmitter site. At least as early as January 1981 (five months after its application was filed and fourteen months before designation for hearing) Royce knew that its originally-proposed site was not available. *See* Royce Opposition to Petition to Enlarge Issues, filed June 2, 1982, Attachments B and C, comprised of letters dated January 8 and 12, 1981 from the National Park Service to Mr. Stolz referring to misunderstandings regarding the availability of Eureka Peak and indicating that no transmitter site would be permitted within the national monument boundaries. Indeed, the Park Service letters strongly suggest that Royce may never actually have had reasonable assurance of the original site's availability, because Mr. Stolz apparently misunderstood what the Superintendent of Joshua Tree National Monument told him regarding the availability of Eureka Peak as a transmitter site.[4] In

[3] In a February 2, 1981 affidavit, Royce's owner, Edward R. Stolz, II, stated that "of late" park authorities had decided to deny Royce use of Eureka Peak. After unsuccessful investigation of other sites, Royce learned on July 30, 1982 that it could use Wide Peak as a transmitter site and, on September 27, 1982, filed a petition for leave to amend to specify that site. After objection by the other parties that use of Wide Peak would create a short-spacing problem, Royce indicated that its engineer believed a directionalized antenna could reduce the problem, and Royce was given until October 22, 1982 specifically to supplement its amendment before the ALJ ruled on its acceptability. On that date, Royce filed the completely different engineering showing that is under consideration here, which did not relate to the Wide Peak site, but rather specified a new site near the one now authorized for use by Station KPLM(FM), Palm Springs, California.

In fact, the question of Royce's knowledge of the unavailability of the Eureka Peak site surfaced in a petition to enlarge the issues filed by Corinthians on April 26, 1982, seeking, *inter alia*, a misrepresentation issue against Royce for having specified the site in the first instance. In response, Royce claimed it had not misrepresented the availability of the site in its application because it was not until it received the National Park Service letters in January 1981 that it was

addition, although the Stolz affidavits accompanying Royce's appeal aver that Mr. Stolz made some efforts to procure a new site, in the Board's view these efforts are wholly inadequate to explain the 20-month delay between January 1981 and September 27, 1982, when Royce finally filed its first transmitter site amendment. *See California Broadcasting Corp.*, 90 FCC 2d 800, 809, 51 RR 2d 1539, 1546 (1982) (interval of more than six months before specifying substitute transmitter site not ordinarily due diligence). And after Royce was granted an extension of time specifically to supplement its September 1982 amendment in order to mitigate the short-spacing problem by directionalizing its antenna, it instead filed the October 22, 1982 amendment, which amendment proposed a wholly new transmitter site. Royce's explanation for this second substitute transmitter site shows further lack of diligence. Mr. Stolz states he had been previously unable to get permission from the licensee of Station KPLM(FM) to use the October 22 site and "only days ago" learned that Southern Pacific Land Company, rather than the licensee, actually owned the site. Stolz Affidavit of October 19, 1982 at 1. In other words, at the time that Mr. Stolz claims to have been negotiating with Station KPLM(FM)'s representative for use of part of their site, he failed to ascertain that they did not own the site and "understood" (or, yet again, misunderstood) KPLM(FM)'s denial of a lease to Royce to be "binding and final"! *Id.* Due diligence, like ambition, "should be made of sterner stuff."[5]

5. Where, as here, an applicant is attempting to cure a potentially disqualifying defect in its application, the Commission has held that diligence should be interpreted in light of the equities of the case. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489, 49 RR 2d 1589, 1594 (1981). We recently applied that standard in *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 52 RR 2d 63 (Rev. Bd. 1982), in which we concluded that, under the circumstances of that case, the successive submission of four curative financial amendments involving three different financial proposals over a seven-month period demonstrated, in fact, zealous diligence in the face of "bad luck." Conversely, Royce's failure to produce a single amendment in 20

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alerted to problems with the site. While the ALJ declined to add a misrepresentation or lack of candor issue for failure of evidence (*see* FCC 82M-3157, released October 13, 1982), it does appear that in specifying the Joshua Tree National Monument site and maintaining that specification despite the January 1981 letters from the National Park Service without promptly advising the Commission of these developments (*see* 47 CFR § 1.65), "Stolz has [again] maneuvered as close to the perimeter as should be permitted" (*George E. Cameron, Jr. Communications*, FCC 83R-20, released March 23, 1983, at para. 52) on this matter of his site specification. At a minimum, however, the National Park Service letters of January 1981 refusing use of the specified site clearly vitiated—more than two years ago—the necessary "reasonable assurance" that the Eureka Peak site would be available.

[5] W. Shakespeare, *Julius Caesar*, Act 3, Scene 2, line 97.

months is not cured by its submission of two differing amendments in September and October 1982, respectively. While taking due account of Mr. Stolz's explanatory affidavits, we nevertheless affirm the ALJ's conclusion that Royce's allegedly curative efforts were clearly too little and too late.[6]

6. Furthermore, acceptance of Royce's proffered amendment would be both disruptive of the hearing and prejudicial to the other parties. While we believe that the already specified engineering issue may be broad enough to encompass the new engineering problems posed by Royce's latest proposal without technical modification or addition of issues,[7] we agree with the ALJ that the amount and direction of proof would be increased, as well as hearing time, because of the new proposal's antenna directionalization and shadowing aspects. Not only is this seriously disruptive of the hearing process, but it is also prejudicial to the other applicants: they clearly have a valid interest in the prompt resolution of this proceeding and initiation of a new radio service.

7. Finally, we are unable to find the good cause for postdesignation engineering amendments required by Section 73.3522(b)(1)(i) of the Rules, 47 CFR 73.3522(b)(1)(i), i.e., that, "the amendment is necessitated by events which the applicant could not reasonably have foreseen," since it appears from the information set forth in paragraph 4, *supra*, that Royce had knowledge in January 1981 that its proposed national park site would not be available. Nor, for the same reasons, can we conclude that Royce's proposed engineering amendment is not the result of its voluntary acts. An applicant's lack of due care in choosing a transmitter site cannot be equated

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[6] A different ALJ recently erroneously asserted in *Payvision Communications*, FCC 83M-1043, released March 31, 1983, at note 2, that the Board's *Bison City* decision "gutted" the due diligence test because we permitted a fifth curative amendment. The Board looks to both quantity and quality of effort in measuring the "equities" of due diligence, as required by *Anax*, and so must all other adjudicatory authorities.

[7] In so ruling, we moot Royce's concern that the ALJ was prejudging the Section 307(b) and contingent comparative issues in this proceeding by implying that that Report and Order which established a Class B FM channel at Yucca Valley, *FM Table of Assignments (Yucca Valley)*, 45 RR 2d 644 (1979), mandated that the eventual station would be licensed to Yucca Valley or would, at minimum, include Yucca Valley within its 60 dBu contour. (Royce's amended application would do neither.) To construe the Report and Order so narrowly could fly in the face of the "15-mile rule" of Section 73.203(b), 47 CFR 73.203(b), which makes Class B channels available to be located within 15 miles of the community to which the channel is assigned in the Table of Assignments. And we find no specific language to that effect in the Report and Order. *Cf. Campbell and Sheftall*, 7 FCC 2d 658, 667, 9 RR 2d 999, 1010 (Rev. Bd. 1967) (a "Section 307(b) determination is a separate, subsequent determination unrelated to the rulemaking" that assigns a channel to a specified community). While the Commission recently repealed Section 73.203(b) in *The Suburban Community Policy*, 53 RR 2d 681, 48 Fed. Reg. 12094 (1983), the applications herein are subject to that rule because they were filed before adoption of the repeal order. *See* 53 RR 2d at 698.

with either unforeseeability or involuntariness when the need to resolve *pre-existing* site problems finally becomes apparent. *Cf. California Broadcasting Corp., supra* (engineering amendment in response to *subsequent* creation of national park deemed unforeseeable and involuntary). To rule otherwise would put a premium on know-nothingism and sanction Royce's reliance on the vain hope that an unfavorable site situation would right itself.[8]

8. For all these reasons, we affirm the ALJ's denial of Royce's petition for leave to amend. *See Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1315–26, 43 RR 2d 1289, 1293–1304 (1978), *rev'd and remanded on other grounds*, 88 FCC 2d 922, 50 RR 806 (1981); *Charles W. Hurt*, 21 FCC 2d 827, 18 RR 2d 533 (Rev. Bd. 1970); *Louis Vander Plate*, 20 FCC 2d 185, 17 RR 2d 577 (Rev. Bd. 1969). While the Commission does promote the public interest goal of a choice among applicants, this policy does "not . . . entirely relieve [applicants] of the good cause requirements" of Section 73.3522 of the Rules and the *Erwin O'Conner* case. *California Broadcasting Corp., supra*, 90 FCC 2d at 808, 51 RR 2d at 1545. Lacking the "unusual circumstances" (see paragraph 7, *supra*) of the *California Broadcasting Corp.* case, 90 FCC 2d at 808, 51 RR 2d at 1545, but well-endowed with voluntariness, disruptiveness, absence of due diligence, and prejudice to the other parties, Royce's proposed October 22, 1982 amendment must be rejected. *Belo Broadcasting Corp., supra.* While Royce's argument that an impending merger among the remaining four applicants will destroy the last hope for a choice among applicants, unless Royce is allowed to amend, has surface appeal, *cf. Bison City TV 49 Limited Partnership, supra*, that merger has not yet been approved. There is also a countervailing public policy favoring the settlement of cases. *See Oak Television of Everett, Inc.*, FCC 83R-25, released April 7, 1983. Given these competing policy interests and Royce's utter lack of "equities" here, we conclude that a probable loss of choice among applicants is preferable to whitewashing the fatal deficiency in Royce's application and disrupting this proceeding further. The public interest compels a modicum of diligence on the part of applicants so that the initiation of a new broadcast service is not held hostage to the malfeasance (and nonfeasance) of would-be licensees.

9. ACCORDINGLY, IT IS ORDERED, That the appeal filed

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[8] See Mr. Stolz's February 2, 1981 Affidavit, at 3:

> "I do believe . . . that an ultimate grant of a use permit for this [Eureka Park] site can still be achieved at some future time. Nevertheless, should the short-term assessment of this aim appear unfavorable, I would voluntarily request an alternate site . . . ." [The first such "request" to the FCC was filed 20 months later.]

February 18, 1983 by Royce International Broadcasting Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

Business Radio Service, Eligibility
Business Radio Service, Frequencies
Frequency, Efficent Use of
Frequency, Loading

Memorandum Opinion and Orders adopted affirming the Private Radio Bureau's cancellation of 800 MHz trunked channels for failure to meet the loading requirements of Rule 90.366(d).
–*Specialized Mobile Radio*

FCC 83–170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Application for Review of

Specialized Mobile Radio Station WYA-671, licensed to AAT Electronics Corporation, Staten Island, New York

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: May 16, 1983)

BY THE COMMISSION:

Commissioner Jones absent.

1. The Commission has for consideration AAT Electronics Corporation's Application for Review of the Private Radio Bureau's Order issued September 21, 1982. The Order denied AAT's Petition for Reconsideration of the Bureau's March 22, 1982, determination which deleted 15 of AAT's 20 authorized channels for Specialized Mobile Radio System (SMRS) WYA-671. The channels were deleted as a result of AAT's failure to meet the minimum loading requirements of mobile units specified in Rule 90.375(e).[1] The Bureau's Order denied AAT's alternative request for a waiver of Rule 90.375(e) or a hearing.

2. In its Application for Review AAT is seeking reinstatement of its complete 20 channel authorization for WYA-671 and an additional three year period to meet the minimum loading requirements. Absent reinstatement, AAT asserts it is entitled to a full hearing

[1] Part 90 of the Commission's Rules was amended effective October 16, 1982, by our adoption of our *Second Report and Order* in Docket No. 79–191, 90 FCC 2d 1281 (1982). Rule 90.375 was amended and is now Rule 90.366. 90.366 did not change the construction and loading requirements for existing SMR systems.

under Sections 303(f) and 316 of the Communications Act of 1934, as amended, to show cause why its channels should not be deleted.

3. There is a waiting list of 26 SMRS applicants desiring channels in the area served by AAT. Reassignment of the channels deleted from AAT's authorization has been held in abeyance pending the outcome of our determination.

Background

4. Rule 90.375(e) (now 90.366) governed the loading and construction requirements for trunked SMR systems. Entrepreneurs seeking facilities of more than five channels could elect to build the station in its entirety or in stages. Those seeking to build all at once were required to construct all channels within one year but were given the entire five year license term to load to 70% of system capacity (1400 mobiles for a 20 channel system).

5. Entrepreneurs were required by Rule 90.359(c) to specify in their application if they were seeking to build an SMR system in stages. Staged construction required that the entrepreneur build five channels within a year and load to 70% of five channel capacity (350 mobiles) within two years. The advantage of staged construction is that it requires a smaller initial investment. It imposes, however, an obligation of meeting minimum loading standards within two years to give assurances that the full system will be developed and in full use within the five year license term.

6. On February 26, 1979, AAT submitted an application for a 20 channel SMRS trunked system, specifying that its authorization was requested ". . . pursuant to Section 90.375(e) of the Commission's Rules to construct a 20-channel system in 5-channel stages." AAT's application was accompanied by Form 400-S on which AAT certified that it was electing to construct in 5 channel stages and that 70% of the required mobiles for loading for 5 channels would be in operation within 2 years from the date of grant. Directly above AAT's authorized signature on Form 400-S was this express provision:

> The applicant acknowledges that, where the authorized facilities are not fully (actually) loaded in accordance with the applicable loading requirements set out in Sections 89.801 and 89.802 of Subpart S of Part 89 of the Commission's Rules, any channels not so occupied may be assigned, at the discretion of the Commission, to another applicant in accordance with the policies set out under this Subpart S of Part 89 of the Rules.[2]

Since 20 channel equipment had not yet been type accepted, a license for a 5 channel trunked facility was granted to AAT for station WYA-671 on April 23, 1979.

7. On May 15, 1979, AAT requested modification of its April 23 authorization to permit 10 channel SMRS capability and specified General Electric equipment which had been type accepted for 10

[2] Parts 89, 91 and 93 of the Rules have been consolidated into Part 90.

channels instead of Motorola equipment. AAT requested to build the 10 channels in 5 channel stages pursuant to Rule 90.375(e) and made the same certification on its application concerning loading and the same acknowledgment concerning reassignment of unloaded channels as it did on its original application. Authorization for 10 channels was granted on August 17, 1979. Shortly thereafter, General Electric 20 channel equipment received type acceptance and on August 23, 1979, AAT applied for a 20 channel modification, still to be constructed in 5 channel stages.

8. On October 25, 1979, the Bureau's Licensing Division requested AAT to provide construction information about its SMR Station WYA-671. AAT was reminded that under its election to build in stages, Rule 90.375(e) required construction of the basic 5 channel group within one year and loading of those 5 channels to 70% of capacity within 2 years. The pertinent license grant date was specified as April 23, 1979.

9. AAT responded to the Licensing Division's October 25 status request on November 7, 1979. It reported that the expected completion date for five channels was December 15, with construction to continue in stages. AAT also noted its pending application filed August 23, 1979, for modification from 10 to 20 channels to be constructed in stages.

10. The Licensing Division notified AAT that it had received the application for modification of its SMRS facility from 10 to 20 channels in a letter dated November 2, 1979. The Licensing Division informed AAT that prior to processing its application, AAT should be aware of the required construction of the first 5 channels within one year and the required loading to 70% capacity for these channels within two years when constructing the facility in stages. The Licensing Division cautioned that:

> It has been brought to our attention that it may be some time before 20 channel mobile units are actually available, even though they may have been type accepted. *Thus, a licensee may make a large financial investment in a trunked system and then not be able to put any users on the system for a year or more because of nonavailability of 20 channel trunked mobile units. In this situation, the licensee might run a risk of losing his license due to not meeting the utilization criteria discussed earlier.* Remember, on a 20 channel trunked system only 20 channel mobile units may be licensed . . .
>
> We will hold your application in a pending status to allow you the opportunity to comment on this letter. Please let us know if you wish to change any aspect of your application. Please respond within thirty days from the date of this letter (emphasis added).

11. AAT's reply was received on December 3, 1979. On behalf of AAT a principal stated:

> I must begin by thanking the FCC for bringing the issue of manufacturers' delivery dates on 20 channel units to my attention. It is an area, I must openly admit, I had incomplete information. Without your letter, I would have entered into an obligation without fully having all the facts before me.

> Since that time, I have been in touch directly with several manufacturers by phone, letters, and personal meetings. However, I am still without a firm, clear delivery date on 20 channel mobiles. I am informed by manufacturers that they will, within 90 days be in a position to predict delivery dates related to 20 channel mobile units.
>
> It is with this in mind that I ask the FCC to continue holding my application in a pending status for 90 days. This will enable me to obtain the information to make an intelligent decision.

It was also stated that AAT was proceeding with the first stage of construction and was promised delivery of the first 5 channel system within 30 days.

12. AAT's application was returned by the Licensing Division on January 2, 1980, at which time AAT was requested to resubmit the application within 30 days if it was still interested in a 20 channel system. On January 21 AAT resubmitted its 20 channel application stating that it had received a delivery date from General Electric. It was further stated that "It is with [the delivery date] in mind that I know we will meet your loading requirements." The application contained the same certification and acknowledgment regarding loading and reassignment of channels as the earlier applications.

13. On February 6, 1980, AAT was granted an authorization increasing its capacity for station WYA-671 to 20 channels. The expiration of the license term shown on the face of the license document was April 23, 1984, five years from the original five channel grant. Also on the face of the license was the following statement:

> This grant does not extend the period within which you must place the station in operation. That period begins from the date of your original authorization.

14. On May 23, 1980, Commission engineers inspected station WYA-671 and determined that AAT had constructed the initial 5 channels. The total loading of the system was less than ten mobile units.

15. On October 26, 1981, AAT sent a letter to the Licensing Division stating:

> This is to notify the Commission that we are proceeding with the construction of the remaining fifteen channels of our above referenced twenty channel trunked system. As the Commission knows, the first five channels of the system have already been constructed and put into operation.
>
> By proceeding in this manner, we will not be constructing in five channel stages, as we had previously indicated. Furthermore, the applicable channel loading deadline will be five years from the grant of our modified license, in accordance with Section 90.375(c), rather than at the end of two years from the grant of our modified license.

The letter indicated that AAT's attorney should be contacted if the Bureau disagreed with the applicability of the five year loading deadline.

16. Bureau Licensing Division records indicate that as of Febru-

ary 22, 1982, only 62 mobiles, or 17% of the 350 mobiles required for minimum loading within the two-year period, were in operation on the initial 5 channels. On March 12, 1982, AAT notified the Licensing Division that the final channel of its 20 channel SMRS facility was operational.

The Bureau's March 22, 1982, Action

17. On March 22 the Bureau advised AAT that its October 26, 1981, assertion that construction of the remaining 15 channels released it from Commission's two year minimum loading requirement was erroneous. The Bureau stated:

> AAT's notification was submitted two and one-half years after its system was initially licensed and more than one and one-half years after a modified authorization was issued. The five channels now constructed have been loaded, according to our records, with 62 mobile units as of February 22, 1982, approximately 12 percent of the maximum specified in Rule 90.375(e) and only 17 percent of the minimum loading requirement (350 mobile units) which it was to have by February 6, 1982, the date on which the two-year loading period for the first stage expired.

The Bureau noted that 90.375(e) contained no provision allowing a licensee to change the election two and one-half years after initial licensing to avoid the consequences of its failure to load the first stage by the end of the two year loading period. The Bureau further stated:

> The inappropriateness of such a change of election in this instance is underscored by the fact that the change would occur long after construction of the first stage was completed and that AAT's system is located in an area where there is a waiting list of applicants for assignment of trunked channels. Furthermore, even were such a change contemplated by our rules, your client failed to satisfy the one-year construction requirement for the balance of the twenty-channel facility, a matter which is confirmed by the language of AAT's letter of October 23, 1981.

In view of AAT's failure to meet the minimum loading requirement the Bureau reclaimed 15 channels from AAT's facility for reassignment to entrepreneurs on the waiting list for that service area. A superseding authorization was issued on March 22, 1982, for the five channels initially constructed.

AAT's Petition for Reconsideration and Request for Waiver or Hearing

18. In its Petition for Reconsideration and Request for Waiver or Hearing, AAT requested the following relief:

> a) a vacating of the Bureau's March 22 letter to allow AAT to change its election so that the 2 year loading deadline of Rule 90.375(e) would not apply to their already fully constructed system; and
>
> b) waiver of the one year construction deadline for completion of AAT's full system.

In the alternative AAT requested the Bureau to grant for compelling

equitable reasons a waiver and extension of the 2 year channel loading deadline. In the absence of a waiver, AAT argued it was entitled to an evidentiary hearing prior to modification of its license under Sections 303(f) and 316 of the Communications Act of 1934, as amended, and Section 558 of the Administrative Procedure Act.

19. AAT asserts that its failure to meet the minimum loading for its initial 5 channel stage was due to factors beyond its control. It maintains that there initially were enormous uncertainties about the equipment and licensing standards for the new 20 channel trunked technology. In view of these uncertainties, AAT postponed construction of the initial five channels until the full 20 channel grant was authorized on February 6, 1980. The first 5 channel stage was constructed shortly thereafter on March 15, 1980.

20. AAT contends and has documented that technical problems were experienced with the General Electric system when the mobiles were first placed in service. General Electric instituted a recall program of its GE-Marc V System whereby it redesigned its trunked signaling system. As of February 23, 1981, General Electric had ordered 4 mandatory changes to its repeaters, 9 to crystal control stations, 15 to synthesized control stations, 7 to crystal mobile units and 14 to synthesized mobile units. There were approximately 23 other changes which, although not mandatory for equipment performance in all cases, were to be done on equipment as required.

21. In May 1981 General Electric introduced a new product line - the GE Marc V Centura, Corona and Classic units. However, the new product line was not readily available until September 1981, approximately 18 months after AAT's first 5 channels were constructed.

22. AAT contends that the combination of delays in equipment delivery and defects in design and performance interfered with its ability to meet its two year minimum loading requirement. As soon as General Electric's technical problems were resolved, AAT asserts, the loading of its system accelerated by 60 mobile units, increasing from 13 to 73 mobile units between August 1981 and March 1982.

23. AAT further states that, as a result of the technical success it was experiencing with its General Electric system, it desired to go forward with the construction of the remaining 15 channels. However, AAT recognized that the two year channel loading deadline of Rule 90.375(e) was rapidly approaching. AAT knew it would have difficulty meeting the loading standard in view of the marketing time lost due to equipment problems. AAT questioned whether the staged construction two year loading dealine in Rule 90.375(e) would apply if it constructed the remaining 15 channels or whether the five year period in Rule 90.375(c) was applicable for a system constructed in its entirety.

24. AAT claims that in September 1981 its counsel discussed the issue with a Bureau staff member who reportedly advised that

construction of all 20 channels would extend the loading period to five years. It is contended that the staff member discouraged AAT from requesting a formal rule interpretation, suggesting that AAT only inform the Bureau's Licensing Division of its intention to fully construct its facility. AAT submits no written evidence of such advice by the Bureau.

25. On October 26, 1981, AAT advised the Licensing Division of its intention to construct the 15 remaining channels and of its assumption that the five year loading period applied. It was requested that the Bureau contact AAT's counsel if the Bureau disagreed with the applicability of the five year loading rule.

26. Having heard nothing from the Bureau, on November 25, 1981, AAT allegedly committed itself to a financial investment in excess of $100,000 by ordering General Electric equipment for expansion of its system to 20 channels. AAT indicates that on January 8, 1982, the same Bureau staff member advised AAT's counsel that the Bureau response to AAT's assumption that the five year loading period applied might "not be favorable". On March 12, 1982, construction of the 15 remaining channels was completed.

AAT Asserts a Change of Election Should be Allowed and a Waiver of the One Year Construction Period Granted

27. Relying on General Electric's equipment problems, AAT argues that the Bureau erroneously concluded that AAT's attempted change of election from staged to entire construction would be inappropriate because it occurred long after the first stage was completed and would result in avoiding the consequences of AAT's failure to load. AAT asserts that the Commission's fundamental policies of maximizing spectrum efficiency and availability would be served by allowing its change in election. It is argued that staged construction was enacted to provide trunked licensees the option of starting a 20 channel system with a modest investment. AAT maintains the two year loading rule was not intended to serve as an early basis for taking a fully constructed system off the air. Since Rule 90.375 is silent with regard to a change of election, AAT claims the Bureau's interpretation prohibiting AAT's change of election is erroneous.[3]

28. AAT maintains that a waiting list of entrepreneurs for assignment of trunked channels is not a legitimate basis for "revoking" AAT's channels. It asserts that since most applicants are already SMRS licensees, there would be no advantage to the public to redistribute AAT's channels to existing SMRS facilities.

29. For the above "compelling public interest reasons" AAT

[3] New Rule 90.366 expressly limits the period for a change of election to the first year of authorization. See para. 41 *infra*.

seeks permission to change its construction election and a waiver of the one year construction period in Rule 90.375(e) for a system constructed in its entirety. Such a waiver would provide AAT the five year loading period specified in Rule 90.375(c) for a fully constructed 20 channel system.

In the Alternative, AAT Requests Waiver of the Two Year Loading Deadline

30. In the alternative, AAT seeks a waiver of the two year minimum loading deadline in Rule 90.375(e) to extend the time for loading its first five channels. It is argued that an extension of time would provide AAT with the opportunity to market its system which was denied due to technical problems with General Electric equipment.

31. AAT asserts that an extension of time would also avoid loss of AAT's substantial investment in constructing its 20 channel system. AAT maintains its investment was made in good faith and in reliance of assurances by a "Bureau official" that the two year loading period would not apply if the full 20 channel system were constructed. Although the waiver request comes after the expiration of the two year period, AAT contends it is timely because it had no reason or opportunity to request waiver prior to the Bureau's March 22, 1982, action.

AAT Maintains it is Entitled to a Hearing Prior to Modification of its License

32. AAT notes that Sections 303(f) and 316(a) of the Communications Act of 1934, as amended, require that a licensee be afforded the right to a hearing prior to modification of a license. Therefore, it is argued that the Bureau's deletion of 15 of AAT's channels violated Sections 303(f) and 316(a) of the Act as well as Section 558 of the Administrative Procedure Act (APA) (5 U.S.C. § 558).[4]

The Bureau's Order Denying AAT's Petition for Reconsideration

33. The Bureau's Order summarized the history of rulemakings in which the Commission authorized trunked SMRS facilities under a regulatory approach which would permit the operation of a free competitive market as the best method for developing new system designs, technology and marketing techniques necessary for the

[4] In its Petition for Reconsideration AAT also noted our *Further Notice of Proposed Rulemaking*, Docket No. 79–191, 46 F.R. 37927 (July 23, 1981), wherein the Commission proposed to adopt rules, to be given retroactive effect, authorizing the Commission to "take back" unloaded or lightly loaded channels. The issue raised by AAT that the Commission had not adopted rules which would apply to previously authorized systems is moot in view of our adoption of our *Second Report and Order*, Docket No. 79–191, *supra*. See paras. 42–44, *infra*.

fuller development of the new spectrum. The Bureau emphasized that the Commission developed loading standards to insure that channels made available to the public were put "in use" and not "in storage." To cope with the uncertainties of a new technology, the Commission gave entrepreneurs the alternatives of constructing their SMRS facilities in stages or in their entirety. The Bureau concluded that the technical problems AAT experienced with General Electric's 20 channel trunked equipment were not an unanticipated consequence of marketing a new technology. It denied AAT's October 1981 request to construct its facility in its entirety since it had already failed to meet the applicable one year construction deadline for the remainder of the channels under an election to build at once and had not even met minimum loading for staged construction.

34. The Bureau noted that at the time there were 26 SMRS applicants waiting for channels in the area served by AAT and determined there was no basis for granting AAT additional time to meet the Commission's loading and construction standards at the expense of other entrepreneur-applicants. The Bureau emphasized that although 15 channels were being returned to the marketplace for reassignment, AAT was not deprived of the 5 channel system initially constructed despite its failure to meet the two year minimum loading criteria. The Bureau noted that AAT's current users retained the benefit of the 5 channel system.

35. With regard to AAT's assertion that it was entitled to a hearing, the Bureau relied upon the Commission's rulemakings establishing the SMR systems and the fact that deletion of the 15 channels was accomplished by superseding the original authorization rather than modifying the license. Therefore, the Bureau concluded that Sections 303(f) and 316 of the Act did not apply to its deletion action.

AAT's Application for Review

36. In its Application for Review, AAT incorporates by reference the arguments presented in its Petition for Reconsideration. It asserts that the Bureau did not address itself to AAT's equitable arguments and plea for waiver on the grounds that the equipment problems precluded loading and were beyond AAT's control. Finally, AAT contends the Bureau has attempted to add an automatic cancellation term onto AAT's April 1979 license grant based upon the Commission's cancellation rules which were adopted in the Commission's August 16, 1982, release of its *Second Report and Order* in Docket No. 79–191, *supra*. It claims that these recently adopted rule changes do not apply to prior issued licenses such as AAT's.

Discussion

37. In our *Second Report and Order*, In the Matter of An Inquiry Relative to the Future Use of the Frequency Band 806–960 MHz, Docket 18262, 46 FCC 2d 752 (1974), we concluded a detailed rulemaking proceeding, initiated in 1968, dealing with the allocation and future use of frequency spectrum in the 806–947 MHz band in the land mobile radio service. In order to realize our goal of maximizing spectrum use and efficiency we chose allocation by "system", rather than radio services, using trunked or conventional technology. We chose to permit the competitive market place to ultimately determine how much spectrum would be utilized by the various types of users. To help promote competition and to provide access to the small business user who could not afford the expenditure required to build these new systems, we created a new entity, the Specialized Mobile Radio System (SMRS) licensee. The SMRS licensee was to be a commercial entity or entrepreneur authorized to make radio facilities available for use by private services eligibles. These licensees would assume the financial risks and obligations of building the expensive 800 MHz systems and were authorized to provide a communications service on a *for profit* basis. *Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975).

38. We determined we would not examine in advance the financial qualifications of each SMRS applicant but would ensure their performance as licensees through mandatory system construction and loading requirements. We stated:

> In meeting our obligations under Section 308(b), all of the requirements for obtaining a radio station authorization have been spelled out in detail in the rules. Each application will be examined to determine if the proposal meets minimum legal and character qualifications, as well as technical, operational, frequency loading, and other requirements. However, the new rules do not require an applicant to show that he has the financial qualifications to construct the proposed facilities. Instead, licensees of "trunked" SMR systems, for example, will be required to begin construction of the authorized facilities within six months of authorization and to complete construction within one year. Further, the *licensee must "load"* his facility in accordance with express standards set out in the new rules. *If he does not, the frequencies assigned, or some of them, will be made available for use by other eligible persons.* This method, in our view, is preferable to the examination of a financial statement to ensure that the frequencies assigned will be used effectively. The Communications Act gives us ample flexibility in this area to adopt measures most conducive ". . . to the proper dispatch of [our] business and to the ends of justice." *Section 4(i) of the Act. See Federal Communications Commission v. Pottsville Broadcasting, Co.*, 309 U.S. 134 (1940), 51 FCC 2d 945, 960 (emphasis added).

39. We sought to ensure that the 800 MHz channels authorized to SMRS licensees were put in "use" and not "in storage". We required ". . . channels assigned to be 'occupied' in accordance with express loading criteria or, if they are not, they become available to other users." *Memorandum Opinion and Order*, Docket No. 18262,

supra, at p. 983. Thus, in developing loading standards for trunked systems we stated:

> . . . we further realize that initial investment . . . required . . . regardless of the number of channels will be . . . heavy. Thus, should we permit licensees to proceed in five-channel stages, it is not likely that there would be any incentive not to go forward with completion of the system, as the greater capacity it has, the greater will be the return on the investment . . . However, we still must emphasize that our objective . . . is to maximize spectrum efficiency and to get these systems established, because they are needed to achieve the degree of efficiency . . . we feel is desirable in terms of the public interest. Therefore, in reaching some balance between that objective and the monetary consideration mentioned, we are going to modify our loading requirement for "trunked" systems to specify that the licensee must show that the system is being developed and loaded so that it will be in full use in the five year term. Thus, we will permit the licensee of a "trunked" facility which has been assigned more than the minimum five channels to proceed with construction as proposed, i.e., in five channel stages; however, the basic facility designed to accommodate a minimum of five channels in "trunked" mode must be completed within the one-year limit specified in the rules. Further, where the licensee elects to proceed in this fashion, *he must show that his system is "occupied" to 70 percent of its capacity at the end of a period of two years* from the date of the grant of his station authorization. *If it is not loaded to this capacity, the unused channels may be assigned to others.* 51 FCC 2d 945, 986 (emphasis added).

40. In our *Further Notice of Proposed Rule Making* in Docket No. 79–191, *supra*, we addressed the problem of spectrum lying vacant while lists of entrepreneurs for trunked channels exist. We stated:

> These rules for trunked systems have allowed the situation in larger urban areas where large numbers of trunked channels have been assigned to SMRs but have only a handful of mobile units on them. Under the present rule structure, we cannot make these channels available to others for two—and in many cases five—years. There is no explicit provision now contained in our rules for cancellation of part or all of these trunked authorizations at the end of the prescribed loading period where the minimum levels have not been achieved. 46 F.R. 37927 at para. 63.

We proposed clarifying our Rules by specifying that at the conclusion of the loading period, where the requisite minimum level has not been achieved, the channels not so loaded would automatically be cancelled. We proposed that any new loading and construction standards adopted should be applied to all existing conventional and trunked systems to provide the requisite efficiency of spectrum usage and enable us to reclaim unused spectrum for reassignment to others. *Further Notice of Proposed Rulemaking*, *supra*, at paras. 68–69.

41. In our *Second Report and Order* in Docket No. 79–191, *supra*, at para. 42, we clarified the sanctions that would be applied to trunked systems which had failed to meet minimum loading criteria. We replaced Rule 90.375 with Rule 90.366 and provided in 90.366(d) that:

> (d) Licensees of trunked facilities must complete construction within one year of initial grant; provided, however, that a licensee of a "trunked" facility assigned

more than the minimum five-channel group and authorized prior to August 1, 1982, may elect to construct the facility in stages. In this event, the licensee shall complete construction of the basic five channel group of the authorized facility within one year. At the end of two years the licensee must demonstrate notwithstanding the provisions of subparagraph (b) that the basic five channel group is loaded to 70 percent with mobile stations which operate over the entire complement of authorized channels. Construction of the next stage cannot begin until the licensee demonstrates a minimum of 70 percent of the loading required for the first stage. *If at the end of two years a licensee who elected to construct in stages has not loaded the first five-channel group to 70 percent and a waiting list for frequencies exists in the system's geographic area, authorization for channels in excess of five cancels automatically.* If at the end of five years the 5 channel system is not loaded to 70 percent of the prescribed level for this period of time and a waiting list for frequencies exists in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. *All licenses are subject to this condition. A licensee may only modify the election to build or not build a system in stages with(in) the first year of authorization. If the election is changed there will be no extension of time to complete construction* (emphasis added).

We stated that Subpart M, Part 90 of our Rules, as modified by our proceeding, applied to *all trunked systems* existing at that time. *Second Report and Order, supra,* at para. 113.

AAT'S Assertion that the Rules as Amended in Docket No. 79–191 Do not Apply to Existing Licensees

42. Despite AAT's recognition in its Petition for Reconsideration that our amended Rules concerning the cancellation of unloaded or lightly loaded channels would be retroactively applied when adopted, AAT now argues in its Application for Review that our amended Rules in Docket 79–191 do not apply to existing SMRS trunked licensees such as AAT. AAT maintains that application of Rule 90.366(d) "grafts an automatic cancellation term on AAT's license" which is *ex post facto* in nature. We reject AAT's argument as we have rejected similar arguments before us. Significantly, the amended Rules do not in any way alter the substantive loading and construction standards placed upon AAT at the time of its license grant. The amended rules merely make explicit the consequences of failing to meet those standards.

43. Even assuming *arguendo* that application of Rule 90.366(d) substantively alters the obligations of AAT, we have previously concluded that there is a legal basis for application of substantive Rule changes to existing licensees. In our *Report and Order* in Docket No. 79–106, 44 F.R. 58737 (October 11, 1979), we amended the Rules governing co-channel mileage separation and frequency loading standards for conventional 800 MHz systems. There we rejected arguments that licensees of existing systems should be permitted to operate under the old standards. Docket No. 79–106, *supra,* at para. 16. We noted that failure to apply the revised Rules to existing licensees would negate the beneficial effects of the entire rulemaking

process with respect to urbanized areas where conventional channels have or in the future would be exhausted. We stated:

> There can be no question that a license is issued subject to the Commission's rules as well as any future revisions thereto. Moreover, the authorizations held by 800 MHz licensees do not specify any quality of service, so that retroactive application of these frequency assignment and loading standards do not impinge upon a specific license provision. *Id*, para. 16.

See also *California Citizens Band Association v. U.S.* 375 F.2d 43, 51–52 (9th Cir. 1967), *cert. denied*, 389 U.S. 844 (1967); *General Telephone Co. of Southwest* v. *U.S.*, 449 F.2d 846, 863–64 (5th Cir. 1971); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *American Airlines* v. *C.A.B.*, 359 F.2d 624 (D.C. Cir. 1966), *cert denied*, 385 U.S. 843 (1966); *Air Line Pilots Ass'n* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968). It is with the above stated policies in mind that we apply new Rule 90.366, adopted in Docket No. 79–191, to AAT as a licensee of an existing trunked system. See *Second Report and Order* in Docket No. 79–191, *supra*, at para. 113.

44. New Rule 90.366(d), which explicitly limits the period for changes in election to the first year of authorization and prohibits extensions of time to complete construction, supports the Bureau's denial of AAT's attempt, made more than 2 1;2 years after it was initially licensed, to change its election to entire construction. The new Rule also supports the Bureau's deletion action since it is undisputed that AAT, having elected to construct in stages, did not load its initial 5 channels to the 70% standard (350 mobiles) within two years. Thus, we find the Bureau's March 22, 1982, action which deleted 15 of AAT's 20 channels for SMRS facility WYA-671 consistent with our Rules as modified in Docket 79–191.

AAT's Request for Waiver

45. AAT seeks a waiver of the provisions of Rule 90.375, now contained in new Rule 90.366, which provide a one year construction period for a system constructed in its entirety, or, in the alternative, a waiver of the two-year minimum loading period for systems constructed in stages. AAT asserts that a waiver should be granted on equitable grounds because equipment problems were beyond its control and that it relied on a "Bureau Official's" representation that it would be permitted to change its selected method of construction. AAT also maintains that a grant of its waiver request would be in the public interest. We disagree.

46. Equipment problems inherent with new 800 MHz system technology are a potential impediment to all SMRS licensees. In fact, upon initial receipt of AAT's modification to a 20 channel system in November 1979, the Bureau advised AAT of possible equipment delays which could result in financial loss to AAT if it decided to pursue a 20 channel authorization. On January 21, 1980, AAT

resubmitted its application for 20 channels asserting that it was certain it would ". . . meet [the Commission's] loading requirements." The application contained AAT's certification and acknowledgement that channels not loaded in accordance with the Commission's Rules could be reassigned to another applicant. AAT's subsequent decision not to vigorously pursue marketing of its 20 channel system because of equipment uncertainties was an independent business judgment and its failure to meet the requisite loading and construction standards is attributable to circumstances under its control. See *In Re applications of Radio Longview, Inc.* 19 FCC 2d 966, 968 (1969), and cases cited therein. Moreover, notwithstanding the technical problems experienced by AAT, we note that during the eight month period August 1981 to March 1982, after equipment defects had been corrected, AAT by its own admission only increased its loading by 60 mobiles, still far short of the necessary pace to meet the required minimum of 350 mobile units in two years.

47. We find AAT's contention that it relied on a "Bureau Official's" representation that it could change its method of construction and would not be bound by the two year loading deadline equally unpersuasive. At the outset we note that the Bureau employee in question was a staff attorney who did not have policy making authority. Moreover, AAT never mentioned any representations made by any Bureau staff member in its October 26, 1981, letter in which AAT advised that it was proceeding to construct its 20 channel system in its entirety. AAT simply offered its preferred Rule interpretation of Section 90.375 and proceeded to act accordingly by ordering 20 channel equipment on November 25, 1981, and completing construction of the equipment on March 12, 1982. Despite AAT's admission that on January 8, 1982, the same Bureau staff member advised that the Bureau's response to AAT's interpretation of Rule 90.375 may not be favorable, there is no evidence that AAT attempted to cancel or delay delivery of the equipment. In the absence of an explicit waiver, AAT's actions were taken at its own risk in an effort to create equities for itself and bind the Commission. We decline to be so manipulated.

48. Finally, AAT argues that the existence of an applicant waiting list is not a legitimate basis for deletion of AAT's channels. It contends that since most applicants are already SMRS licensees, there would be no public benefit to redistributing AAT's channels to existing SMRS facilities. AAT's position is without merit. In keeping with our desire to encourage spectrum use we adopted Rule 90.621 in Docket No. 79–191, which provides that SMRS licensees may be assigned a maximum of 5 additional channels at any one time only if their existing channels are loaded to 90% of the minimum (90% of 500 mobile units or 450 mobile units for a 5 channel system). Thus, contrary to AAT's claim, reassignment of AAT's 15 channels, *minimally utilized by AAT for three years*, would serve the public

interest by making those channels available to the public through entrepreneurs who have demonstrated an immediate need for additional spectrum. Likewise, if AAT ever fully loads its five channels, Rule 90.621 will provide AAT the opportunity to apply for additional channels. For these reasons we find no basis for granting AAT a waiver of our Rules.

AAT's Request for a Hearing

49. We find the Bureau's deletion of 15 channels from AAT's SMRS facility WYA-671 was not a modification of its license as AAT asserts. Rather it was the enforcement of construction and loading conditions which were placed upon the original license grant. In fact these conditions were repeatedly and expressly certified to on Form 400-S by AAT.

50. Therefore, we reject AAT's contention that it is entitled to an evidentiary hearing prior to the modification of its license under Sections 303(f) and 316 of the Act and Section 558 of the Administrative Procedure Act (5 U.S.C. § 558). The Bureau's deletion action was predicated upon *conditions imposed on AAT as well as all other similarly situated SMRS licensees at the time their licenses were initially granted.* Routine enforcement of conditions imposed upon the entire private land mobile community is not a modification as contemplated by Sections 303(f) and 316 of the Act. AAT's failure to meet the construction and loading conditions associated with its license grant is undisputed. A hearing would serve no purpose in that a hearing is not the appropriate vehicle for seeking a waiver of the conditions imposed by our Rules. As we stated in Docket No. 79–106, *supra*, at para. 16:

> In short, we are convinced that the frequency assignment and loading standards can be revised with respect to existing licensees by rulemaking without compromising hearing rights under Section 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 316(a).[4]

We repeat that application of new Rule 90.366(d) to all SMRS licensees does not alter the loading or construction requirements imposed on AAT at the time of its initial license grant by Rule

[4] Section 316(a) is designed to protect individual licensees by allowing a right to a hearing before the Commission can modify a particular license. Section 316's hearing rights, however, are not applicable when the Commission enacts rules directed against an industry in general or a broad class of licensees. *E.g., Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142, 1160–1165 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601, 617–20 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968); *Satellite Business Systems, et. al.*, 62 FCC 2d 997, 1063–68 (1977); *Multiple Ownership*, 53 FCC 2d 589, 594–95 (1975). This is especially so when, as here, we do not expect that any party will encounter substantial harm through the rule change. And if any party should encounter substantial harm, we will of course entertain petitions for waiver under Section 1.3 of the Commission's rules (47 C.F.R. § 1.3). See *E.g, WBEN, Inc.* v. *U.S.* v. *supra*, at 618.

90.375. New Rule 90.366(d) merely provides an explicit Rule provision which reflects our cancellation and reassignment policy consistently enunciated since 1975. As previously noted, any financial loss incurred by AAT is a consequence of its own inexpedient action. AAT's request for waiver has been considered and denied.[5]

Conclusion

51. Public benefit of this new trunked radio service must not be delayed. In the rulemakings establishing new SMR systems, we clearly recognized that a new technology was being made available to the public and that marketing and engineering problems would be inherent in its development. We considered this in setting the construction and loading standards and gave entrepreneurs options of how to proceed. AAT has failed to meet the Commission requirements placed on entrepreneurs in this new service and the next entrepreneur must now be given the opportunity to successfully deliver this new service to the public. There are 26 waiting to do so. Some have been waiting longer than three years. The 15 channels that AAT has not been able to fully deliver to the public must now be returned to the marketplace. To do otherwise would frustrate our longstanding policy against spectrum lying vacant while waiting lists of applicants exist. There are now waiting lists in 14 major cities.[6]

52. Finally, this action allows AAT and its users to retain a 5 channel SMR facility for the remainder of AAT's license term. Upon renewal the Bureau will determine, consistent with our Rules, if AAT's facility is sufficiently loaded to allow it to retain all of its remaining 5 channel system.

53. Based on all of the foregoing, we affirm the Bureau's March 22, 1982, action which deleted 15 channels from AAT's SMRS trunked facility WYA-671. We also affirm the Bureau's denial of

[5] AAT also asserts a right to a hearing under Section 558 of the Administrative Procedure Act (5 U.S.C. § 558). Section 558 of the APA does not mandate a hearing prior to agency action. It only requires written notice and an opportunity to demonstrate or achieve compliance prior to "the withdrawal, suspension, revocation or annulment of a license." Assuming *arguendo* that this section applies, AAT repeatedly acknowledged the Commission's loading requirements in its applications and was provided written notice on March 22, 1982. AAT concedes that it is not in compliance with the Commission's loading standards and it has had ample opportunity to demonstrate its position during the course of the proceeding. We find no merit to AAT's contention that Section 558 of the APA requires a hearing in this matter.

[6] On November 15, 1982, the Licensing Division began accepting applications for the 80 new channels made available in the 800 MHz band for SMR systems by our release of our *Second Report and Order* in Docket No. 79–191, *supra*. This resulted in applications for 341 channels in AAT's area alone although only 80 channels are available.

AAT's request for waiver or hearing. The deleted channels should be routinely reassigned by the Bureau.

54. Accordingly, AAT's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

FCC 83–171

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Application For Review of

Specialized Mobile Radio Station WZC-792, licensed to P & R Temmer, d/b/a Mobile Communications Service Company Brooklyn, New York

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: May 16, 1983)

BY THE COMMISSION:

Commissioner Jones absent.

1. The Commission has for consideration P & R Temmer's, d/b/a Mobile Communications Service Company, Application for Review of the Private Radio Bureau's Order issued September 21, 1982. The Order denied Temmer's Petition for Reconsideration of the Bureau's March 22, 1982, determination which deleted 15 of Temmer's 20 authorized channels for Specialized Mobile Radio System (SMRS) WZC-792. The 15 channels, which were unconstructed, were deleted as a result of the Bureau's finding that Temmer failed to meet the minimum loading requirements for mobile units as specified in Rule 90.375(e).[1] The Bureau denied Temmer's alternative request for waiver of Rule 90.375(e) or hearing.

2. In his Application for Review Temmer is seeking reinstatement of his complete 20 channel authorization for WZC-792 and an extension of time to meet the minimum loading requirements. Absent reinstatement, Temmer asserts he is entitled to a full hearing under Section 316 of the Communications Act of 1934, as amended, to show cause why his channels should not be deleted.

3. There is a waiting list of 26 SMRS applicants desiring channels in the area served by Temmer. Reassignment of the channels deleted from Temmer's authorization has been held in abeyance pending the outcome of our determination.

[1] Part 90 of the Commission's Rules was amended effective October 16, 1982, by our adoption of our *Second Report and Order* in Docket No. 79–191, 90 FCC 2d 1281 (1982). Rule 90.375 was amended and is now Rule 90.366. 90.366 did not change the construction and loading requirements for existing SMR systems.

Background

4. Rule 90.375(e) (now 90.366) governed the loading and construction requirements for trunked SMR systems. Entrepreneurs seeking facilities of more than five channels could elect to build the station in its entirety or in stages. Those seeking to build all at once were required to construct all channels within one year but were given the entire five year license term to load to 70% of system capacity (1400 mobiles for a 20 channel system).

5. Entrepreneurs were required by Rule 90.359(c) to specify in their application if they were seeking to build an SMR system in stages. Staged construction required that the entrepreneur build five channels within a year and load to 70% of five channel capacity (350 mobiles) within two years. The advantage of staged construction is that it requires a smaller initial investment. It imposes, however, an obligation of meeting minimum loading standards within two years to give assurances that the full system will be developed and in full use within the five year license term.

6. On March 21, 1979, Temmer submitted an application for an SMRS trunked system specifying that it was his intention to expand to a 20 channel system as soon as 20 channel equipment was type accepted by the Commission. Temmer's application was accompanied by Form 400-S on which Temmer certified that, if granted a 20 channel authorization, he was electing to construct in 5 channel stages and that 70% of the required mobiles for loading for 5 channels would be in operation within 2 years from the date of the grant. Directly above Temmer's signature on Form 400-S was this express provision:

> The applicant acknowledges that, where the authorized facilities are not fully (actually) loaded in accordance with the applicable loading requirements set out in Sections 89.801 and 89.802 of Subpart S of Part 89 of the Commission's Rules, any channels not so occupied may be assigned, at the discretion of the Commission, to another applicant in accordance with the policies set out under this Subpart S of Part 89 of the Rules.[2]

Since 20 channel equipment had not yet been type accepted, a license for a 5 channel trunked facility was granted to Temmer for station WZC-792 on May 31, 1979.

7. On December 10, 1979, Temmer advised the Bureau's Licensing Division that construction of his 5-channel facility began in September 1979 and that he anticipated his station would begin operating in early February 1980. Temmer also requested a modification to increase to a 20-channel system as stated on his original application since he was advised by Motorola that 20-channel equipment was now type accepted.

8. In a letter dated May 1, 1980, Temmer again requested to

[2] Parts 89, 91 and 93 of the Rules have been consolidated into Part 90.

amend his application for a 20-channel system repeating that it was his desire "... to build the system by the five channel add-on option." Temmer also requested to move his transmitter site from one location to another in Brooklyn, New York.

9. On May 19, 1980, Temmer was granted an authorization increasing the capacity of station WZC-792 to 20 channels. On the face of the license was the following statement:

> This grant does not extend the period within which you must place the station in operation or meet loading requirements. That period begins from the date of your original authorization.

The expiration date was May 31, 1984, five years from the original 5 channel authorization. The authorization also granted Temmer's request to change the transmitter location.

10. A Commission engineer visited Temmer on January 19, 1982, to obtain information about station WZC-792. Temmer stated 5 of the authorized 20 channels were constructed and that he elected to construct his facility in stages. Bureau Licensing Division records indicate that as of February 17, 1982, 75 mobiles, or 21% of the 350 mobiles required for minimum loading within the two-year period, were in operation on the initial 5 channels.

11. On April 6, 1982, Temmer filed a request for modification of his transmitter site from Brooklyn to Manhattan. Temmer's license was modified on July 2, 1982. The modification was without prejudice to the matters in issue in this proceeding.

The Bureau's March 22, 1982, Action

12. On March 22 the Bureau advised Temmer that station WZC-792 was not in compliance with Rule 90.375(e) because the entire 20 channel system was not constructed within 1 year.[3] The Bureau noted that even if Temmer was permitted to construct in stages, the 75 mobile units authorized to use his facility was less than 25% of the minimum loading (350 mobiles) required within two years by Rule 90.375(e). In view of Temmer's failure to meet the requirements of Rule 90.375(e), the Bureau reclaimed 15 unconstructed channels from Temmer's facility for reassignment to entrepreneurs on the waiting list in the New York City area. An authorization was issued March 22, 1982, limiting WZC-792 to the 5 constructed channels.

Temmer's Petition For Reconsideration

13. In his Petition for Reconsideration Temmer requested the following relief:

[3] In his Petition for Reconsideration Temmer asserted that he properly elected to construct in stages and that he was not required to build the entire system at once. This matter is no longer in issue since the Bureau, in its September 21, 1982, Order denying Temmer's petition, agreed that Temmer's election to construct in stages was proper and timely.

a) a vacating of the Bureau's March 22 determination, reinstatement of the 15 deleted channels and a waiver of the two year loading period in Rule 90.375(e) for facilities constructed in stages to allow Temmer "a reasonable additional period to achieve complete compliance."

or

b) In the alternative, a full adjudicatory hearing in accordance with Section 316 of the Communications Act of 1934, as amended.

Temmer's Request for Waiver and Extension of the Two Year Loading Period in Rule 90.375(e)

14. Temmer acknowledges that his system has not achieved the required mobile loading but contends that loading was delayed by ". . . unforseen (sic) circumstances essentially outside of [his] control." Temmer asserts that his facility was one of the first Motorola trunked systems operating in the New York City market. As a result, his facility experienced all of the technical problems associated with a pioneering system. While Temmer concedes that Motorola corrected the major problems, he maintains that his system developed a "bad reputation." As a result, Temmer alleges that Motorola salespeople, who SMRS licensees using Motorola equipment depend upon to market their system, were reluctant to sell mobiles for operation on Temmer's facility.

15. Temmer also asserts that Motorola sales people avoided selling mobiles for use on his system because of its location in Brooklyn rather than Manhattan. Temmer characterizes his transmitter site location as ". . . more of a problem of perception than one of substance."

16. Temmer states that he has taken steps to alleviate his problems which will result in expeditious loading of his system. Temmer has entered into a tentative agreement with a communications company to participate in the ownership and operation of his system. Temmer has moved his station location, at considerable expense, to a desirable site in Manhattan. Motorola has provided assurances that it will work in full cooperation with Temmer to market his system. Finally, Temmer has ordered the equipment for the remaining 15 channels from Motorola.

17. Temmer contends that his request for an extension of the two year loading period in Rule 90.375(e) is analogous to applications for extensions of broadcast construction permits. He argues that the Commission routinely grants extensions of broadcast construction permits where there are factors that militate in favor of an extension (see paras. 34–35 *infra*).

18. Temmer asserts that his expensive and agressive steps to overcome his system's problems warrant the extension of time he is seeking. He argues an extension would expedite 800 MHz trunked service in the New York City area because he can promote his system better than a new SMRS licensee. Temmer states that if he is

not permitted to keep the 15 additional channels, he will face financial ruin. The annual cost of the Manhattan antenna site is approximately $30,000 with annual service contracts costing $10,000. With other costs the annual operating costs total approximately $50,000. Temmer asserts a five channel system would only allow him to recover his annual operating expenses with no hope of recovery of his initial $160,000 investment.

Temmer Maintains he is Entitled to a Hearing Prior to Modification of his License

19. Temmer notes that Section 316 of the Communications Act of 1934, as amended, requires that a licensee be afforded the opportunity to appear at a hearing prior to modification of his license. Temmer argues that the Bureau's deletion action was an individual action directed against him as a licensee and was not the result of a general rulemaking proceeding. Therefore Temmer contends that the Bureau's March 22, 1982, deletion must be set aside since the hearing procedures in Section 316 of the Act were not followed.

The Bureau's Order Denying Temmer's Petition for Reconsideration

20. The Bureau's Order summarized the history of rulemakings in which the Commission authorized trunked SMRS facilities under a regulatory approach which would permit the operation of a free competitive market as the best method for developing new system designs, technology and marketing techniques necessary for the fuller development of the new spectrum. The Bureau noted that the Commission developed loading standards to insure that channels made available to the public were put "in use" and not "in storage". The Bureau emphasized that the Commission stated, on the occasion of its initial offering of SMRS systems to entrepreneurs on a for profit basis seven years ago, that systems not loaded to 70% (350 mobiles) within two years would have their channels assigned to others. To cope with the uncertainties of a new technology, the Commission gave entrepreneurs the alternatives of constructing their SMRS facilities in stages or in their entirety. The Bureau concluded that Temmer's large financial investment and actions to improve the marketability of his system did not obviate his responsibility to meet minimum loading standards.

21. The Bureau noted that at the time there were 26 SMRS applicants waiting for channels in the area served by Temmer and determined there was no basis for granting Temmer additional time to meet the Commission's loading requirement at the expense of other entrepreneur-applicants. The Bureau emphasized that although 15 channels were being returned to the marketplace for reassignment, Temmer was not deprived of the 5 channel system

initially constructed despite his failure to meet the two year minimum loading criteria. The Bureau noted that Temmer's current users retained the benefit of the 5 channel system.

22. With regard to Temmer's assertion that he was entitled to a hearing, the Bureau relied upon the Commission's rulemakings establishing SMR systems and the fact that deletion of the 15 channels was accomplished by superseding the original authorization rather than modifying the license. Therefore, the Bureau concluded that Section 316 of the Act did not apply to its deletion action.

Temmer's Application For Review

23. In his Application for Review, Temmer reiterates the arguments presented in his Petition for Reconsideration. Temmer urges us to set aside the Bureau's March 22 deletion of his 15 channels asserting that Rule 90.375(e) provides no basis for the Bureau's action. Temmer makes no reference to Rule 90.366(d), which amended and replaced Rule 90.375(e) effective October 16, 1982. See footnote 1, *supra*. Temmer's specific contentions are addressed in detail below.

Discussion

24. We affirm the Bureau's deletion of Temmer's 15 channels. Our decision is based upon our application to Temmer, as an existing SMRS licensee, of Rule 90.366(d) which was adopted in our *Second Report and Order* in Docket No. 79–191, *supra*, and became effective October 16, 1982. Rule 90.366(d) serves to clarify the procedures followed when the Commission's loading and construction standards are not met and furthers our goal of maximizing spectrum efficiency and use. Docket 79–191, *supra*, at para. 42. The rule makes no substantive change to the loading and construction requirements of existing licensees; it states that channels in excess of 5 cancel automatically when minimum loading standards are not met. We believe a brief history of our proceedings involving SMRS 800 MHz systems would be helpful prior to further discussion of Rule 90.366(d).

25. In our *Second Report and Order*, In the Matter of An Inquiry Relative to the Future Use of the Frequency Band 806–960 MHz, Docket 18262, 46 FCC 2d 752 (1974), we concluded a detailed rulemaking proceeding, initiated in 1968, dealing with the allocation and future use of frequency spectrum in the 806–947 MHz band in the land mobile radio service. In order to realize our goal of maximizing spectrum use and efficiency we chose allocation by "system", rather than radio services, using trunked or conventional technology. We chose to permit the competitive marketplace to ultimately determine how much spectrum would be utilized by the various types of users. To help promote competition and to provide

access to the small business user who could not afford the expenditure required to build these new systems, we created a new entity, the Specialized Mobile Radio System (SMRS) licensee. The SMRS licensee was to be a commercial entity or entrepreneur authorized to make radio facilities available for use by private services eligibles. These licensees would assume the financial risks and obligations of building the expensive 800 MHz systems and were authorized to provide a communications service on a *for profit* basis. *Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975).

26. We determined we would not examine in advance the financial qualifications of each SMRS applicant but would ensure their performance as licensees through mandatory system construction and loading requirements. We stated:

> In meeting our obligations under Section 308(b), all of the requirements for obtaining a radio station authorization have been spelled out in detail in the rules. Each application will be examined to determine if the proposal meets minimum legal and character qualifications, as well as technical, operational, frequency loading, and other requirements. However, the new rules do not require an applicant to show that he has the financial qualifications to construct the proposed facilities. Instead, licensees of "trunked" SMR systems, for example, will be required to begin construction of the authorized facilities within six months of authorization and to complete construction within one year. Further, the *licensee must "load"* his facility in accordance with express standards set out in the new rules. *If he does not, the frequencies assigned, or some of them, will be made available for use by other eligible persons.* This method, in our view, is preferable to the examination of a financial statement to ensure that the frequencies assigned will be used effectively. The Communications Act gives us ample flexibility in this area to adopt measures most conducive ". . . to the proper dispatch of [our] business and to the ends of justice." *Section 4(i) of the Act. See Federal Communications Commission v. Pottsville Broadcasting, Co.*, 309 U.S. 134 (1940), 51 FCC 2d 945, 960 (emphasis added).

27. We sought to ensure that the 800 MHz channels authorized to SMRS licensees were put in "use" and not "in storage". We required ". . . channels assigned to be 'occupied' in accordance with express loading criteria or, if they are not, they become available to other users." *Memorandum Opinion and Order*, Docket No. 18262, *supra*, at p. 983. Thus, in developing loading standards for trunked systems we stated:

> . . . we further realize that initial investment . . . required . . . regardless of the number of channels will be . . . heavy. Thus, should we permit licensees to proceed in five-channel stages, it is not likely that there would be any incentive not to go forward with completion of the system, as the greater capacity it has, the greater will be the return on the investment . . . However, we still must emphasize that our objective . . . is to maximize spectrum efficiency and to get these systems established, because they are needed to achieve the degree of efficiency . . . we feel is desirable in terms of the public interest. Therefore, in reaching some balance between that objective and the monetary consideration mentioned, we are going to modify our loading requirement for "trunked" systems to specify that the licensee must show that the system is being developed and loaded so that it will be in full use in the five year term. Thus, we will permit the licensee of a "trunked" facility which has been assigned more than the

> minimum five channels to proceed with construction as proposed, i.e., in five channel stages; however, the basic facility designed to accommodate a minimum of five channels in "trunked" mode must be completed within the one-year limit specified in the rules. Further, where the licensee elects to proceed in this fashion, *he must show that his system is "occupied" to 70 percent of its capacity at the end of a period of two years* from the date of the grant of his station authorization. *If it is not loaded to this capacity, the unused channels may be assigned to others.* 51 FCC 2d 945, 986 (emphasis added).

28. In our *Further Notice of Proposed Rule Making* in Docket No. 79–191, 46 F.R. 37927 (July 23, 1981), we addressed the problem of spectrum lying vacant while waiting lists of entrepreneurs for trunked channels exist. We stated:

> These rules for trunked systems have allowed the situation in larger urban areas where large numbers of trunked channels have been assigned to SMRs but have only a handful of mobile units on them. Under the present rule structure, we cannot make these channels available to others for two—and in many cases five—years. There is no explicit provision now contained in our rules for cancellation of part or all of these trunked authorizations at the end of the prescribed loading period where the minimum levels have not been achieved. 46 F.R. 37927 at para. 63.

We proposed clarifying our Rules by specifying that at the conclusion of the loading period, where the requisite minimum level has not been achieved, the channels not so loaded would automatically be cancelled. We proposed that any new loading and construction standards adopted should be applied to all existing conventional and trunked systems to provide the requisite efficiency of spectrum usage and enable us to reclaim unused spectrum for reassignment to others. *Further Notice of Proposed Rulemaking*, *supra*, at paras. 68–69.

29. In our *Second Report and Order* in Docket No. 79–191, *supra*, at para. 42, we clarified the sanctions that would be applied to trunked systems which had failed to meet minimum loading criteria. We replaced Rule 90.375 with Rule 90.366 and provided in 90.366(d) that:

> (d) Licensees of trunked facilities must complete construction within one year of initial grant; provided, however, that a licensee of a "trunked" facility assigned more than the minimum five-channel group and authorized prior to August 1, 1982, may elect to construct the facility in stages. In this event, the licensee shall complete construction of the basic five channel group of the authorized facility within one year. At the end of two years the licensee must demonstrate notwithstanding the provisions of subparagraph (b) that the basic five channel group is loaded to 70 percent with mobile stations which operate over the entire complement of authorized channels. Construction of the next stage cannot begin until the licensee demonstrates a minimum of 70 percent of the loading required for the first stage. *If at the end of two years a licensee who elected to construct in stages has not loaded the first five-channel group to 70 percent and a waiting list for frequencies exists in the system's geographic area, authorization for channels in excess of five cancels automatically.* If at the end of five years the 5 channel system is not loaded to 70 percent of the prescribed level for this period of time and a waiting list for frequencies exists in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. *All licenses are subject to this*

condition. A licensee may only modify the election to build or not build a system in stages with(in) the first year of authorization. If the election is changed there will be no extension of time to complete construction (emphasis added).

We stated that Subpart M, Part 90 of our Rules, as modified by our proceeding, applied to *all trunked systems* existing at that time. *Second Report and Order*, *supra*, at para. 113.

30. Our application of Part 90 as modified in Docket 79–191, *supra*, is consistent with our stated policies since 1975. While we determined that the allocation of spectrum in Docket No. 18262, and the subsequent promulgation in that proceeding of Rules governing its use were appropriate at that time, we anticipated and acknowledged that experience in dealing with novel and untried standards in 800 MHz systems might warrant revisitation and adjustment to our regulatory structure. See 46 FCC 2d at 781–2 and 51 FCC 2d at 978–9.

31. In our *Report and Order* in Docket No. 79–106, 44 F.R. 58737 (October 11, 1979), we amended the Rules governing co-channel mileage separation and frequency loading standards for conventional 800 MHz systems. There we rejected arguments that licensees of existing systems should be permitted to operate under the old standards. Docket No. 79–106, *supra*, at para. 16. We noted that failure to apply the revised Rules to existing licensees would negate the beneficial effects of the entire rulemaking process with respect to urbanized areas where conventional channels have been or in the future would be exhausted. We stated:

> There can be no question that a license is issued subject to the Commission's rules as well as any future revisions thereto. Moreover, the authorizations held by 800 MHz licensees do not specify any quality of service, so that retroactive application of these frequency assignment and loading standards do not impinge upon a specific license provision. *Id*, para. 16.

See also *California Citizens Band Association v. U.S.* 375 F.2d 43, 51–52 (9th Cir. 1967), *cert. denied*, 389 U.S. 844 (1967); *General Telephone Co. of Southwest* v. *U.S.*, 449 F.2d 846, 863–64 (5th Cir. 1971); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *American Airlines* v. *C.A.B.*, 359 F.2d 624 (D.C. Cir.1966), *cert denied*, 385 U.S. 843 (1966); *Air Line Pilots Ass'n* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968). It is with the above stated policies in mind that we apply new Rule 90.366, adopted in Docket No. 79–191, to Temmer as a licensee of an existing trunked system. See *Second Report and Order* in Docket No. 79–191, *supra*, at para. 113.

32. Rule 90.366(d) supports the Bureau's deletion action since it is undisputed that Temmer, having elected to construct in stages, did not load his initial 5 channels to the 70% standard (350 mobiles) within two years. Thus, we find the Bureau's March 22, 1982, action which deleted 15 of Temmer's 20 channels for SMRS facility WZC-792 consistent with our Rules as modified in Docket 79–191.

Temmer Asserts the Bureau did not Adequately Consider Circumstances Beyond his Control which Delayed Loading

33. Temmer's contention that his failure to load his system was due to circumstances beyond his control is without merit. Any technical problems associated with Motorola's new equipment were common to all early 800 MHz Motorola systems and were ultimately resolved. Temmer admits a major impediment to loading was that his initial transmitter site was in Brooklyn rather than Manhattan, which he describes as ". . . more of a problem of perception than one of substance." Regardless of how the problem is characterized, in the final analysis it is Temmer's problem created by his choice of transmitter location. The location of his transmitter was not a circumstance beyond his control. The fact that the Motorola sales force did not exercise its best efforts to market Temmer's system because of its Brooklyn location does not release Temmer from the Commission's loading requirements. Temmer's decision to invest in Motorola equipment, his initial selection of a transmitter location, and his reliance on Motorola to market his system were independent business judgments. His failure to meet the requisite loading standards as a result of these business decisions is attributable to circumstances under Temmer's control. See *In Re application of Radio Longview, Inc.*, 14 FCC 2d 966, 968 (1969).

Temmer Argues that Denial of his Request for an Extension of Time is Against Commission Policy and Precedent

34. Temmer maintains the Bureau ignored his showing that he has taken vigorous and expensive steps to place him in a better position to load his system at a much faster rate. These steps include moving the transmitter to Manhattan, entering into a tentative joint ownership agreement with a communications company and ordering the remaining equipment to complete his 20 channel system. Temmer seeks to have his efforts serve as the basis for an extension of time citing, by analogy, Commission precedent in applications for extensions of time in broadcast construction permits. Temmer argues that the Commission normally grants extensions of construction permits where failure to timely construct was due to unforseen circumstances beyond the licensee's control or where "other matters," such as commencement of construction or financial commitment, militate in favor of an extension. *Northeast TV Cablevision corp., et al.*, 21 FCC 2d 442 (1970); *Radio Longview, Inc.*, 19 FCC 19 FCC 2d 966 (1969); *St. Anthony TV Corp.*, 22 FCC 2d 375 (1970); *Beta T.V. Corp.*, et al., 25 FCC 2d 496 (1970); *Leon County Communications Corp., et al.*, 27 FCC 2d 877 (1971); *Chicago Federation of Labor and Industrial Union Council*, 54 FCC 2d 471 (Rev. Bd. 1975).

35. Temmer's reliance on the above cases is misplaced. Broadcast construction permits are granted after the Commission has determined, on a comparative basis, which application will best serve the public interest. See our *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398–9 (1965). Having identified the permittee who will best utilize the spectrum, there may be a public interest basis for granting extensions for construction permits. In contrast, we allow the marketplace to establish which licensees are utilizing channels to the prescribed minimum levels. Those who successfully load their channels are allowed to retain them. Those who do not must return them to be reassigned to other would-be providers, some of whom have waited a number of years for the opportunity to utilize the reassigned channels. Temmer's failure to approach the minimum loading standards after two years is not in dispute. Clearly, we cannot permit Temmer to retain unused spectrum while waiting lists for additional spectrum exist.

Temmer Contends an Extention of Time is in the Public Interest

36. We disagree with Temmer's contention that there is no public benefit in reassignment of Temmer's channels to other SMRS licensees. In keeping with our desire to encourage spectrum use we adopted Rule 90.261 in Docket No. 79–191, which provides that SMRS licensees may be assigned a maximum of 5 additional channels at any one time only if their existing channels are loaded to 90% of the minimum (90% of 500 mobile units or 450 mobile units for a 5 channel system). Thus, contrary to Temmer's claim, reassignment of Temmer's 15 channels would serve the public interest by making those channels available to the public through entrepreneurs who have demonstrated an immediate need for additional spectrum. Likewise, if Temmer ever fully loads his five channels, Rule 90.261 will provide Temmer the opportunity to apply for additional channels. For these reasons we find no basis for granting Temmer an extention of the two year minimum loading period for systems constructed in stages.

Temmer's Request for a Hearing

37. We find the Bureau's deletion of 15 channels from Temmer's SMRS facility WZC-792 was not a modification of his license as Temmer asserts. Rather it was the enforcement of a loading condition which was placed upon the original license grant. In fact the condition was expressely certified to on Form 400-S by Temmer.

38. Therefore, we reject Temmer's contention that he is entitled to an evidentiary hearing prior to the modification of his license under Section 316 of the Act. The Bureau's deletion action was predicated upon *conditions imposed on Temmer as well as all other similarly situated SMRS licensees at the time their licenses were initially granted.* Routine enforcement of conditions imposed upon

the entire private land mobile community is not a modification as contemplated by Section 316 of the Act. Temmer's failure to meet the loading conditions associated with his license grant is undisputed. A hearing would serve no purpose in that a hearing is not the appropriate vehicle for seeking a waiver of the conditions imposed by our Rules. As we stated in Docket No. 79–106, *supra*, at para. 16:

> In short, we are convinced that the frequency assignment and loading standards can be revised with respect to existing licensees by rulemaking without compromising hearing rights under Section 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 316(a).[4]

We repeat that application of new Rule 90.366(d) to all SMRS licensees does not alter the loading or construction requirements imposed on Temmer at the time of his initial license grant by Rule 90.375. New Rule 90.366(d) merely provides an explicit Rule provision which reflects our cancellation and reassignment policy consistently enunciated since 1975. Any financial loss incurred by Temmer as a result of our decision is unfortunate. However, the Commission cannot insure an entrepreneur against business losses at the expense of other entrepreneurs who are waiting for additional spectrum. Temmer's request for a waiver and extension of time has been considered and denied.

Conclusion

39. Public benefit of this new trunked radio service must not be delayed. In the rulemakings establishing new SMR systems, we clearly recognized that a new technology was being made available to the public and that marketing and engineering problems would be inherent in its development. We considered this in setting the construction and loading standards and gave entrepreneurs options of how to proceed. Temmer has failed to meet the Commission requirements placed on entrepreneurs in this new service and the next entrepreneur must now be given the opportunity to successfully deliver this new service to the public. There are 26 waiting to do so. Some have been waiting longer than three years. The 15 channels that Temmer has not constructed must now be returned to the

[4] Section 316(a) is designed to protect individual licensees by allowing a right to a hearing before the Commission can modify a particular license. Section 316's hearing rights, however, are not applicable when the Commission enacts rules directed against an industry in general or a broad class of licensees. *E.g., Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142, 1160–1165 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601, 617–20 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968); *Satellite Business Systems, et. al.*, 62 FCC 2d 997, 1063–68 (1977); *Multiple Ownership*, 53 FCC 2d 589, 594–95 (1975). This is especially so when, as here, we do not expect that any party will encounter substantial harm through the rule change. And if any party should encounter substantial harm, we will of course entertain petitions for waiver under Section 1.3 of the Commission's rules (47 C.F.R. § 1.3). See *E.g, WBEN, Inc.* v. *U.S.* v. *supra*, at 618.

marketplace. To do otherwise would frustrate our longstanding policy against spectrum lying vacant while waiting lists of applicants exist. There are now waiting lists in 14 major cities.[4]

40. Finally, this action allows Temmer and his users to retain a 5 channel SMR facility for the remainder of Temmer's license term. Upon renewal the Bureau will determine, consistent with our Rules, if Temmer's facility is sufficiently loaded to allow it to retain all of its remaining 5 channel system. Likewise, if Temmer sufficiently loads his 5 channel system the Commission will entertain his application for additional channels.

41. Based on all of the foregoing, we affirm the Bureau's March 22, 1982, action which deleted 15 channels from Temmer's SMRS trunked facility WZC-792. We also affirm the Bureau's denial of Temmer's request for waiver and extension of time or hearing. The deleted channels should be routinely reassigned by the Bureau.

42. Accordingly, Temmer's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

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[4] On November 15, 1982, the Licensing Division began accepting applications for the 80 new channels made available in the 800 MHz band for SMR systems by our release of our *Second Report and Order* in Docket No. 79–191, *supra*. This resulted in applications for 341 channels in Temmer's area alone although only 80 channels are available.

Citizens Radio Service
License, Revocation

Where licensee engaged in repeated and willful violations of three CB rules and also willfully interfered with Commission inspection of his station, license revocation was imposed. Mitigating arguments were rejected.
–Theodore E. Sousa
SS Docket No. 78–89

FCC 83R–19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of THEODORE E. SOUSA 14909 Cottage Grove Dolton, Illinois 60419 Licensee of Station KEV-6939 in the Citizens Band Radio Service	SS Docket No. 78–89

Appearances

Elizabeth H. Smith on behalf of Theodore E. Sousa, and *Daniel A. Sarno* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

DECISION

(Adopted: March 14, 1983; Released March 18, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. The Commission remanded this proceeding to the Review Board for consideration of the merits of Theodore E. Sousa's exceptions to an Initial Decision (79 FCC 2d 545 (1979)) which recommended that Mr. Sousa's Citizens Band radio license be revoked. Memorandum Opinion and Order, FCC 82–480, released November 4, 1982.[1] In the Order to Show Cause by which the Bureau initiated this proceeding (SS-198–78, released January 24, 1978), Mr. Sousa was alleged to have operated his station on June 15, 1977 in willful and repeated violation of the following Commission Rules:

[1] The Commission's Order reversed the Board's earlier Decision (71 FCC 2d, 330 (Rev. Bd. 1979)) which had held that a license could not be revoked solely on the basis of licensee misconduct that occurred during a previous license term and was known by Commission investigators prior to a grant of license renewal.

Section 95.471(c) — failure to identify the station by its assigned call sign; Section 95.501(b) — communicating with another station at a distance of more than 150 miles; and Section 95.469(b) — communications in excess of five consecutive minutes.[2] The violations were deemed to be repeated because Mr. Sousa had paid forfeiture liabilities for violations of these Rules in 1973 and 1976. The show cause Order further alleged that on June 15, 1977 Mr. Sousa failed to make his radio station available for inspection when requested to do so by authorized Commission representatives, in willful violation of Section 95.521 of the Commission's Rules.[3] The Order concluded that it appeared "the Commission would be warranted in refusing to grant an application filed by Sousa for a Citizens Band radio station license if the original application were now before it."[4]

2. In his Initial Decision, Administrative Law Judge Joseph Stirmer found that Sousa had engaged in repeated and willful violations of the Rules as charged. He stated that Mr. Sousa's proclivity to violate the same rules for which he had been fined on two previous occasions established his unfitness to remain a licensee and that his failure to allow an inspection of his station constituted an additional basis for revocation. In his exceptions, Sousa argues that his refusal to allow inspection of his station was not willful because he was not personally familiar with the rules in this regard and relied on the advice of counsel, that his past forfeiture payments for the other rule infractions were not admissions of previous violations, and that the ALJ ignored substantial mitigating evidence in Mr. Sousa's favor. We reject these exceptions and affirm the ALJ's conclusion that revocation is warranted.

3. To begin with, the record plainly establishes, and Sousa does not dispute, that on June 15, 1977, he committed the rule violations with which he is charged. *See I.D.*, paras. 7, 9, 13, 19. Sousa's exceptions relate only to whether the violations found were repeated and willful as alleged in the show cause order. His specific claim that the particular rule violations for which he also paid forfeitures for violating in 1973 and 1976 (Sections 95.501(b), 95.469(b), and 95.471(c)) were not repeated because he did not admit guilt on those previous occasions is not only fanciful but is belied by the facts of record. Thus, the evidence shows that Sousa responded to the 1973 Notice of Violations by explaining the corrective measures he had taken to insure that there would be no future recurrences (*I.D.*, para. 5), and responded to the 1976 Notice with attempts to explain (but

[2] These rule sections were subsequently simplified in ways not relevant here, and renumbered.

[3] *Id.*

[4] Section 312(a)(2) of the Communications Act of 1934, as amended, provides that the Commission may revoke any station license because of conditions coming to its attention "which would warrant it in refusing to grant a license or permit on an original application."

not deny) the violations. *I.D.*, para. 6. In again violating these rules on June 15, 1977, Sousa must be found to have acted willfully not only because he knew he was doing the acts in question, *see Kenneth L. Gilbert*, 52 RR 2d 965, 966 (Rev. Bd. 1982); *Bernard J. Winner*, 48 RR 2d 799, 801 (Rev. Bd. 1980), but also, as the ALJ found (*I.D.*, para. 18), because he must have known of the Commission's requirements from his earlier forfeitures.

4. With regard to his refusal to allow the inspection we reject Sousa's denial of willfulness based on his claimed ignorance of the relevant rule because Sousa testified that he was award from information printed on the back of his license application form that his station should be available for inspection. Tr. 133. Moreover, as stated in the cases cited above, a finding of willfulness does not require a showing that the licensee knew he acted wrongfully but only that he knew he was doing the acts in question, *see* Section 312(f) of the Communications Act (47 U.S.C. § 312(f) (1982); *Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141 (1963), and there is no question here that Sousa knew he was preventing an inspection. His further contention that he relied on counsel's advice that a warrant was needed before the inspection could take place is not exculpatory either since the Commission engineers seeking to make the inspection at the time informed him that this advice was erroneous, that the Commission's rules required that he make the station available for inspection, and that his refusal could result in revocation of his license. Tr. 91–2. While advice of counsel may in appropriate circumstances be a mitigating factor, it "cannot excuse a clear breach of duty by a licensee." *Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969). Here, because Sousa knew from his license form of the inspection requirement, and was given independent corroboration by the Commission engineers, his reference to counsel's advice is not sufficient in and of itself to excuse his conduct.

5. Finally, we also reject Mr. Sousa's claim that there is other evidence of mitigation in the facts that he now complies with the Commission's rules and has organized a CB organization which advocates operation in compliance with the rules. In the ALJ's words, these actions "came much too late". *I.D.*, para. 24. Mr. Sousa did not reform after the 1973 or 1976 forfeitures but only after revocation proceedings were begun and, in any event, the Commission has held that reform is expected as a result of legal sanctions and cannot exonerate past misconduct once it is established. *WWIZ, Inc.*, 37 FCC 685 (1964). In view of the totality of evidence of repeated and willful rule violations established on this record, we conclude that revocation is the only appropriate result. *See Roy A. Filbert*, 6 FCC 2d 883 (Rev. Bd. 1967); *Ralph Yago*, 35 FCC 113 (Rev. Bd. 1963).

6. ACCORDINGLY, IT IS ORDERED, That the license of Theo-

dore E. Sousa for Station KEV-6939 in the Citizens Band Radio Service IS REVOKED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL *Member, Review Board*

NOTE: Pursuant to Section 1.104 of the Rules, 47 CFR § 1.104, the revocation ordered herein becomes effective 40 days after the release date of this Decision, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or the Commission. Immediately upon the effective date of this Decision, the licensee shall forward to the Commission the license revoked. Operation of the Citizens Band Radio Station herein after the effective date will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person in violation to the penal sanctions specified in Section 501 of the Communications Act. A copy of this Decision shall be served by Certified Mail, Return Receipt Requested on Theodore E. Sousa at his last known address, 14909 Cottage Grove, Dolton, Illinois 60419.

Equipment Authorization Program
Radio Frequency Device, Authorization
TV Interface

Report and Order adopted revising rules in Subpart H of Part 15 for Class I TV Devices, now to be called TV Interface Devices. These are devices such as TV games and video cassette recorders which feed a signal to the antenna input of a TV receiver for display. The revision relaxes the limits on radiated emissions and permits use of stand-alone RF modulators.
–TV Interface Devices
Gen. Docket No. 79–244

FCC 83–57

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 15 of the Commission Rules to provide for the operation of a TV Interface Device.	Gen. Docket 79–244 RM-3328 RM-2876

REPORT AND ORDER

(Adopted: February 9, 1983; Released: March 4, 1983)

BY THE COMMISSION:

I. *INTRODUCTION*

1. In 1972 the Commission adopted the rules in Subpart H of Part 15 to permit the attachment of TV games and similar devices to a TV receiver.[1] The old rules required the complete device (which includes both the RF modulator and video source) to be tested and approved by the Commission. It was defined as a Class I TV Device.[2]

[1] Report and Order, FCC Docket 19281: In the Matter of Amendment of Part 15 of the Commission's Rules to regulate the operation of a Class I TV Device - a new restricted radiation device which produces a RF carrier modulated by a TV signal. Adopted December 6, 1972, 38 FCC 2d 430.

[2] A Class I TV device is defined in § 15.4(m) as a restricted radiation device that produces on frequencies allocated for TV broadcasting, a radio frequency carrier modulated by a video signal and which feeds the modulated RF signal to the TV receiver by wire or cable.

In response to petitions filed by Texas Instruments, Inc. (TI) and RCA Corporation (RCA)[3], requesting the Commission to permit a stand-alone RF modulator and to consolidate the Commission's requirements for composite devices, respectively, the Commission initiated this proceeding on September 18, 1979.[4]

2. In the *Notice of Proposed Rule Making (Notice)* in this proceeding, we proposed to replace the definition of Class I TV device in § 15.4(m) of the Commission's Rules with the term TV Interface Device, which would cover any device that attaches to and uses the TV receiver to display video images.[5] This definition would permit the use of a stand-alone RF modulator, whereas the present Class I TV device definition does not. We also proposed in the *Notice* to relax the emission limits for such devices to coincide with the technical limits recently adopted by the Commission for personal computers.[6] A number of other changes to Subpart H of Part 15 were also proposed.

3. In general, the proposed Rules, with a few exceptions, are adopted as proposed. A discussion of the comments filed in this proceeding along with our response to them is given below. The eleven parties who filed comments are listed in Appendix A, attached. The new rules adopted herein are in Appendix C, attached. The measurement procedure the Commission will use to test the equipment to determine compliance with the Commission's Rules is given in Appendix B, attached.

4. In addition to filing a petition requesting the Commission to relax the Class I TV device Rules, TI concurrently filed a petition for waiver of the present rules in Subpart H of Part 15 to allow TI to immediately market its personal computer and separate RF modulator. In response to this petition for waiver, the Commission granted a conditional waiver of the Rules.[7] The waiver permitted TI to market a TV Interface Device subject to certain conditions, including those set out in the *Notice*. It also granted the Chief Scientist delegated authority to grant similar waivers to other persons willing to meet the same conditions. Since the *Order Granting Waiver in Part* was adopted, approximately 90 such waivers have been granted.

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[3] The RCA petition was filed on April 6, 1977 and designated RM-2876. The TI petition was filed on February 16, 1979 and designated RM-3328.

[4] Notice of Proposed Rule Making, FCC General Docket 79–244, FCC 79–556, released October 11, 1979, 44 Fed. Reg. 59570 (1979).

[5] The number of devices that use the TV receiver as a display device has been steadily increasing. Examples include personal computers, video disc players and video tape recorders, teletext and videotex decoders and TV games. Some of these products include a built-in RF modulator and some depend on connection to a stand-alone RF modulator.

[6] *See* 47 C.F.R. Subpart J of Part 15.

[7] Order Granting Waiver in Part, 73 FCC 2d 720 (1979).

II. *DISCUSSION*

A. *TV Interface Device vs. Class I TV Device*

5. As noted above, the *Notice* in this proceeding proposed to replace the Class I TV device rules with a single set of rules for all devices incorporating an RF modulator, including a stand-alone RF modulator. In general, all of the commenters with the exception of Atari supported the proposal to permit stand-alone modulators. In support of the proposal, TI argued that the availability of the TV Interface Device Rules would decrease the cost of personal computer systems to the consumer, since a separate RF modulator would not be needed for each component of the system that feeds a signal to the antenna terminals of the TV receiver.

6. Atari, in its comments, opposed the adoption of the proposed rules on the grounds that since Atari was capable of manufacturing a composite device (one including both the video source plus RF modulator) that complied with the strict Class I TV device requirements, other manufacturers should be capable of doing the same. In our opinion, it is immaterial whether one manufacturer can meet the more stringent requirements for a Class I TV device. The more important issues are whether they are so stringent that the costs to the manufacturer of meeting the Class I TV device requirements are too high and whether the relaxed requirements for the TV Interface Device would be a source of interference to TV reception.

7. As will be shown below, there is nothing in the record to warrant the Commission precluding stand-alone RF modulators, especially since RF modulators already authorized as TV Interface Devices under the waivers granted to TI and others (including Atari) have not resulted in interference complaints. Accordingly, we are revising Subpart H of Part 15 to adopt the definition of TV Interface Device. The present rules relating to Class I TV Devices are deleted. Class I TV devices already approved by the Commission are not affected by this action.

B. *Emission Limits*

8. In the *Notice* we proposed to relax the radiation limits for the TV Interface Device rather than retain the more stringent limits for the Class I TV device. We adopt without change those proposed limits. The comments were generally split between equipment manufacturers like TI and producers of TV receivers such as RCA and GTE, who supported less stringent limitations, and television broadcast interest groups like the Association of Maximum Service Telecasters, Inc. (AMST) and the National Association of Broadcasters (NAB), which opposed the relaxation of emission standards. Atari also opposed the relaxation.

9. Comments submitted by RCA were most representative of the support for the relaxed radiation and conduction limits for the TV

Interface Device. RCA emphasized, with support from the Consumer Electronics Group of the Electronic Industries Association (EIA), that the Commission should institute a follow-up program to assess the effectiveness of the new emanation standards in avoiding interference to TV reception. Should such interference arise, RCA pointed out, the Commission would be alerted early-on to persuasive evidence of interference caused by the TV Interface Device. A follow-up program could then be instituted and would reveal the necessary changes (to be implemented through rulemaking) to avoid such interference. AMST suggested in reply that the rulemaking process is too slow to modify the rules to prevent widespread interference, since great numbers of TV Interface Devices would already be in the hands of the public before tighter standards could be instituted.

10. Broadcast interests, represented by NAB and AMST, alleged that the radiation limits we proposed would result in harmful interference to television reception within the Grade B signal contour. AMST argued that in closely spaced dwellings like apartment buildings or townhouses at the outer reaches of the grade B signal contour, interference could be caused when the TV Interface Device is "separated by as much as 100 meters—more than 300 feet" from the victim TV receiver. Atari agreed, stating that for the lowband VHF, a TV receiver in a grade B signal area would have to be separated from the TV Interface Device by more than 200 feet to avoid harmful interference. These arguments are very much like those advanced by these same parties in recommending against the adoption of the very same emissions standards for computers. Those standards were, nevertheless, found adequate to protect television reception and were adopted in the *First Report and Order* in Docket 20780 concerning computing devices.[8]

11. We reject the arguments of Atari and the broadcasters alleging potential interference to TV reception for the same reasons given in the reconsideration of the *First Report and Order* as quoted below:

> . . . both Atari and AMST fail to acknowledge the large number of variables in developing such a [radiation] limit. The likelihood of worst case factors occurring at the same time is very small. In addition to the dimensions of time, space and frequency, paragraph 55 of the *First Report* discusses additional factors such as: greater attenuation due to walls and orientation of both the TV antenna and home computers could substantially reduce emissions of computers located closer than 10 meters . . . Moreover, the population density in areas lying outside of Grade A service contours [i.e. Grade B or beyond] (another parameter in determining the limit) of TV stations there is usually a reduction in population density and viewers are more likely to utilize outdoor antennas. Thus, there should be a low inciden[ce] of interference because of reduced population density and the distance separating computers located in homes and outdoor television

[8] Computing Devices, Subpart J of Part 15, Section 15.801 et. seq., 47 C.F.R. § 15.801 et seq. *See* Computing Devices, First Report and Order in Docket 20780, 79 FCC 2d 28 (1979), *reconsideration*, 79 FCC 2d 67 (1980), *clarification*, 85 FCC 2d 638 (1981).

receiving antennas. (Paragraph 47 of the *Order Granting in Part Reconsideration of the First Report and Order*, 79 FCC 2d 67, 80 (1980).)

12. Further, in actual practice the TV signal in the Grade B contour has been adequate to preclude interference to TV reception. We have not received the complaints of interference predicted by the model of the environment assumed by Atari and AMST, even though we have been permitting via waivers the marketing and use of TV Interface Devices subject to the higher limits.

13. Nonetheless, some parties questioned why radiation interference limits for the TV Interface Device should be less stringent than those for the category of devices it replaces—the Class I TV device. First, as we had concluded in the *Notice*, the Class I limits were apparently unnecessarily stringent and that no measurable benefit has been revealed from having more stringent radiation limits. Lending support to our conclusion is the experience of the last few years in which the predicted compliants of interference have not been received.[9] Second, we intend to minimize and simplify the regulatory scheme the Commission imposes. We do so by setting emission limits for the TV Interface Device designed to provide adequate protection for broadcast TV. Also by making the limits identical to those for the personal computers, we avoid more than one emission classification and provide for the application of a single standard for the computer (or any other video source) and the TV Interface Device, both employed in the home.[10] Therefore, we promote clarity in the rules, minimizing confusion in determining how different pieces of equipment should be categorized. The costs of compliance are thereby reduced, presumably leading to lower cost personal computing systems and other devices. For the foregoing reasons, we adopt the proposed emission limits, which are identical to the limits we adopted for personal computers. (*See* Appendix C, Rule § 15.610)

C. *Equipment Authorization*

14. In the *Notice*, the Commission proposed Certification as the equipment authorization procedure for the TV Interface Device rather than Type Approval, which was required for Class I TV device.[11] The broadcasters and Atari objected to this relaxation of

[9] Since 1980, the Chief Scientist has granted over 90 waivers of the Class I TV device rules, authorizing the operation of the TV Interface Device under the rules proposed in the *Notice*. As related above, the Commission is not aware of any interference cases where the TV Interface Device was identified as the source of the interference.

[10] We treat in more detail the video source, attachments and other accessories to the TV Interface Device below in paragraph 23.

[11] Type Approval is an equipment authorization procedure in which the FCC Laboratory tests a representative sample of a device and issues an approval. Certification is a procedure in which we review test data submitted to the

the equipment authorization requirement. AMST and Atari argued that Certification does not provide the necessary assurances of compliance and that the Commission should use whatever resources are necessary to test such equipment to protect TV reception. Atari also asserted that new manufacturers of a TV Interface Device, who have never made radiation measurements to determine compliance with FCC Rules, will not possess the necessary skills to accurately test a device for compliance. This, Atari suggested, would lead to more non-compliant devices on the market and as a result more potential for interference.

15. Our proposal to relax the equipment authorization requirement for such devices was based on our experience with manufacturers who over the past 10 years have acquired the necessary skills to produce and measure compliant Class I TV devices. At the time Subpart H of Part 15 was adopted, the Commission imposed the stricter Type Approval requirements for two reasons. First, the rules permitted a new class of devices to be attached to the TV receiver and we wanted to be sure that the devices did not interfere with TV reception. Second, manufacturers who began building Class I TV devices were unfamiliar with making radiated emission measurements, particularly to meet the tight limits adopted for Class I TV Devices. Consequently, we felt that imposing the additional burden of Type Approval on these manufacturers was appropriate in 1972. We have now relaxed the limits, which reduces the complexity of the testing, and experience tells us we can also relax the regulatory burden of Type Approval for the TV Interface Device. In response to Atari's argument concerning the lack of skill of new manufacturers in meeting the technical requirements including the testing for compliance, it should be noted that the Commission reserves the right to call in a sample for testing as part of the Certification process, if the situation so warrants. (*See* 47 C.F.R. § 2.943). In addition, we can engage in sampling of products already on the market. For the foregoing reasons, we adopt Certification as the equipment authorization procedure for the TV Interface Device. (*See*, Appendix C, Rule § 15.616.)[12]

Commission and issue an approval, if the submittal is satisfactory. (See 47 C.F.R. Part 2, Subpart J) Both procedures are a prerequisite for marketing pursuant to 47 C.F.R. Part 2, Subpart I.

[12] On January 13, 1983 the Commission adopted a Notice of Proposed Rulemaking entitled "In the Matter of Amendment of the regulations to expand the notification and verification equipment authorization procedures", General Docket No. 83–10, FCC 83–4, released January 21, 1983. In that NPRM we proposed to relax the equipment authorization requirements for certain equipment. For the TV Interface Device, however, we are not further relaxing such requirements because of its potential for interference. This concern was raised in paragraph 18 of that NPRM for equipment not proposed to be included under notification. Despite no reports of interference as cited in paragraphs 12 and 13 above, the potential remains high since TV Interface Devices are high-volume

D. *Miscellaneous Issues*

16. Most of the rules regarding design requirements are adopted as proposed in the *Notice*, with exception of some minor changes in response to the comments. As to the Section 15.614(a), General design requirements, and Section 4.0, General Test Conditions, in our recommended measurement procedures we have revised the range of video input signal levels required to test the TV Interface Device (*See* Appendix B, *Recommended FCC Measurement Procedure for the TV Interface Device*, MP-3.) All parties commenting on this question took issue with the one to ten volt range proposed in the *Notice*. EIA recommends five volts as the maximum video input signal because it asserted that most measurement facilities do not possess costly video amplifiers capable of producing ten volts into the typical 75 ohm load. We have been convinced by TI and Sony that designing the TV Interface Device to prevent excessive emissions when it is presented with a ten volt input voltage is unnecessarily expensive. Most video sources operate in the range of only one to two volts. Furthermore, overload circuitry may be easily incorporated to preclude the TV Interface Device from operating with excessive input voltage. We are persuaded by TI, Sony and EIA that five volts should be the maximum. Therefore, a TV Interface Device shall operate within the emissions limits of the new Subpart H when presented with a video input signal level of one to five volts. (*See* Appendix C, Rule § 15.614(a) and § 4.0, Appendix B.)

17. Another modification to the proposed rules involves a change recommended by TI that limits the interference potential of the TV Interface Device and promotes design flexibility. We proposed in Section 15.603 that the maximum output signal level for the video modulated signal be specified as 346.4 $\sqrt{R}$ microvolts (where R is the output impedance of the device) and that the power of the sound modulated signal be specified as 13 dB below the corresponding power of the video modulated signal. Both of these requirements now apply to the Class I TV device. We adopt the 346.4 $\sqrt{R}$ microvolt level for the video modulated signal and an absolute maximum level of 77.5 $\sqrt{R}$ microvolts for the sound modulated signal rather than the 13 dB for the power ratio between them. We reject the contention by EIA that since the rules for broadcasting and cable TV specify visual/aural ratios of 7–10 dB and 13–17 dB, respectively, deviation from these ranges can cause impairment of the sound or picture reception or both. We believe that setting of those ratios for TV Interface Devices should be largely a marketplace decision subject to compliance with the above-stated limit. Furthermore, the voltage level maximum that we do set leads to a more flexible design, and is

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consumer items used in close proximity to TV receivers. The possibility exists, however, of changing to notification should our future experience so indicate, as generally stated in paragraph 19 of the NPRM.

consistent with the absolute levels in Sections 15.606 and 15.608. This flexibility is appropriate because of the considerably broad ranges of the output signal level of video sources. Equipment designers are permitted greater flexibility by not having to maintain that 13 dB ratio between the two signals when the voltages are lower than maximum levels. Of particular importance, the interference potential of the TV Interface Device will not be increased at all given the establishment of maximum output signal levels.

18. At paragraph 24 in the *Notice* we addressed the problem of the inadvertent connection of the output of the TV Interface Device to the receiving antenna of the TV receiver. This connection could result in the receiver antenna acting as a transmitting antenna for the TV Interface Device, thus greatly increasing the potential for interference to nearby TV receivers. To date we are not aware of any reports attributable to such a misconnection. Our discussion in the *Notice* and the comments thereto, however, focused on TV receivers as used for reception of conventional over-the-air TV signals via an associated antenna. We are, of course, aware of the increasing prevalence of the use of TV receivers for reception of signals via direct cable connection, thereby eliminating the necessity for an attached antenna. Although some cable converters are regulated under the Rules for cable television in Part 76, there are some that fall outside the jurisdiction of Part 76. A cable converter attached to a Master Antenna TV system is an example of such a converter. For such systems it is extremely unlikely for the output of the TV Interface Device to be connected to the antenna of the TV receiver. Thus, we do not believe it is necessary to incorporate a switch to minimize the possibility of such misconnection. We therefore will not require that a transfer switch be incorporated in a TV Interface Device which converts or otherwise processes all TV channels including standard terrestrial broadcast TV signals. In other words, when the TV Interface Device provides for reception of conventional over-the-air TV and the receiver's associated antenna is not required, the transfer switch will not be required either. (*See* Appendix C, Rule § 15.606(b)). It should be noted, however, that this relaxation of the switch requirement will only be permitted for non-radiating systems in which it is not possible for the signal from the TV Interface Device to be radiated and cause interference. For example, for systems using Subscription TV decoders that feed only subscription TV signals to the TV receiver there is no relaxation, and a decoder must be used incorporating an isolation switch (when the decoder includes an RF modulator).

19. In the *Notice*, we proposed that a TV Interface Device must include a switch which provides a certain level of isolation between the antenna terminals and RF modulator. In addition to the switch, AMST suggests that we should adopt a requirement that would provide for foolproof design or construction such that under no

circumstances could the device be connected directly to the receiving antenna. Unfortunately, AMST did not suggest how this could be accomplished. Furthermore, we do not believe such measures are practical or necessary, especially in light of the lack of complaints involving such devices. Therefore, the suggestion made by AMST to add additional restrictions to Section 15.606 is not accepted.

20. Another aspect of interference caused at the output of the TV Interface Device is the potential for harmful interference when emissions beyond a certain strength fall outside of the desired channel. We had proposed that at any RF output terminal the voltage of any emission outside of the band 4.25 MHz below and 7.75 MHz above the video carrier frequency on which the TV interface operates shall not exceed 10.95 $\sqrt{R}$ microvolts. TI, Atari and EIA in particular took issue with this proposal because it was alleged that manufacturers would be forced to utilize either more sophisticated modulation techniques, sharper filters, or other techniques, any of which would entail greater expense in the transmission of both video and sound information.[13] The consumer in turn would incur greater expense in purchasing the TV Interface Device incorporating an RF modulator. To accommodate the double sideband generated sound carrier, without added expense, we are adopting EIA's recommendation, that emissions more than 4.6 MHz below and 7.4 MHz above the video carrier frequency be attenuated. We incorporate such modification in the Rules. (*See* Appendix C, Rule § 15.608.)

21. In the *Notice*, we proposed in Section 15.610 to consolidate the requirements for a composite TV Interface Device that includes an RF modulator and a video source or some other component that might be subject to another part of the Rules. This proposal was intended to replace the present requirements of filing two or more applications for equipment approval of a composite device. For example, under the Class I TV device rules, a video tape recorder (VTR), which includes a TV tuner and an RF modulator plus other components, was subject to the technical and Certification requirements in Subparts C and H of Part 15, respectively. Under the proposal, a single application for Certification would be filed for the

[13] Typically, the commenters economically derive the sound carrier in an RF modulator by employing double sideband modulation such that one sound carrier is 4.5 MHz above the visual carrier frequency and the other (undesired) 4.5 MHz below the visual carrier. Under the rules for a Class I TV device, emissions outside of the channel 3 MHz above and 3 MHz below the respective edges of the 6 MHz TV channel had to be attenuated. To have the undesired carrier fall within 3 MHz of the edges of the TV channel, the class I TV device would be operated on a visual carrier frequency at least 250 kHz higher than that used for broadcast TV. Under the proposed rule, because the emission limits were referenced to the visual carrier rather than the channel edges, operation of the TV Interface Device on a higher visual carrier would no longer keep the undesired sound carrier within limit. Manufacturers would have been required either to employ a single sound carrier below use more expensive filters, etc. to attenuate emissions falling 250 kHz or more outside of the lower channel edge.

VTR. The technical requirements for the composite device would be determined by the applicable requirements for each part of the composite device. Most commenters supported this part of the proposal, but questioned the proposed language and asked that it be clarified. Atari, on the other hand, argued that the most restrictive technical requirement for the composite device should be applied to the complete device.

22. A closely related question concerns the proposed definition of video source, which was defined as a device that applies a video input to a TV Interface Device. RCA argued that this definition is too restrictive, since it does not encompass stand-alone or external video sources that do not connect to a TV Interface Device. The definition, RCA asserts, should be broadened to include video cameras and other devices which may or may not be connected to a TV Interface Device.

23. The above concerns about the definition and proposed Section 15.610 deal with the applicable limits for a composite TV Interface Device and for external attachments to the TV Interface Device. Upon further reflection, it now appears that the proposed language may have been confusing and that some clarification is needed. A TV Interface Device, by definition, may include a video source (and possibly other components), or it may be marketed separately as an RF modulator. In general, most attachments to a TV Interface Device (one exception being that of controllers for TV games) incorporate digital circuitry and, as such, are classified by the Commission to be computing devices. The Rules for computing devices were adopted by the Commission in late 1979 in FCC Docket 20780. In that proceeding, we made home computing devices subject to the same emission limits proposed and adopted herein for TV Interface Devices. Therefore, as to their respective interference potentials it does not matter whether the video source is internal or external to the TV Interface Device, since both devices must meet the same emission limits. Video disc players and video tape recorders, however, constitute an exception that caused some confusion. VTRs contain a TV tuner, which by itself is subject to the receiver requirements in Subpart C of Part 15. Some disc players on the other hand, contain a capacitive coupling mechanism which is subject to the requirements for a Field Disturbance Sensor in Subpart F of Part 15 of the Rules.

24. In the *Notice*, we proposed a single authorization for these devices and an adjustment in the limit for emissions from the TV tuner and the capacitative mechanism of the disc players. The present rules for a Class I TV device permit this and we do not know of any reason not to allow an adjustment of the limit for these products. By doing this we disagree with and reject the contrary recommendation by Atari to require the composite TV Interface Device to be governed by the tightest technical requirements. We

believe such a requirement to be impractical and unnecessary for these two products, since there does not appear to be an interference problem with video tape and disc players. Also, since most video sources, such as personal computers, are already required to be certificated by the Commission pursuant to Subpart J of Part 15, there is no longer a reason to retain a separate definition and Certification requirement for video sources. The few attachments to TV Interface Devices that contain digital circuitry and are not classified as personal computers will be handled as Class B computing devices subject to Verification by the manufacturer. Attachments, such as paddle controllers (i.e., a connecting wire plus a few variable resistors), that do not include active components, do not have to be certificated by the Commission. Such controllers do, however, have to be exercised with the TV Interface Device when it is tested for compliance. In response to RCA's concern about a video camera that does not contain digital circuitry, we are deferring this question to the resolution of the proposal to revise Section 15.7 in FCC Docket 20780. For the above reasons, proposed Section 15.610 (redesignated Section 15.618) has been revised as indicated and the definition for video source has been deleted. (*See* Appendix C, Rule § 15.618.)

25. In the *Notice* we proposed to provide for the marketing of a TV Interface Device kit. The hazards of allowing such a kit are pointed out in Atari's comments. Our intention in this proceeding to provide broadcast television with sufficient protection from harmful interference would be undermined by the authorization of TV Interface Device kits, asserts Atari. There are two problems. First, since we proposed that all necessary components need not be provided with a kit, radiation limits could be exceeded, or the carrier frequency could wander or both. Second, since, according to our proposal, consumers may be required to tune their TV Interface Devices, a serious risk exists that the device might be mistuned, thereby causing interference to nearby receivers. We are aware of these potential hazards as well as the hazard of kits on the marketplace not explicitly subject to any regulation. We believe that the potential for interference is less if all kit manufacturers and consumers are required to comply with our Rules than if there were a prohibition on kits, since this would be difficult to enforce, or if there were a laissez-faire environment in which there were no specific guidelines for compliance. Thus, we adopt the proposed rule authorizing TV Interface Device kits. We require that two kits be fully assembled and tested rather than the one we had proposed in the *Notice*. The manufacturer of the kit shall comply with the procedure for obtaining Certification. Additionally, these new rules incorporate a labelling requirement. (*See* Appendix C, Rule § 15.620.)

26. Finally, we adopt an expanded version of the proposed Section 15.622. This version includes a labeling requirement for the

TV Interface Device itself. Manufacturers must affix a label whose wording is specified in the Section to inform the consumer of the interference potential of the device.

27. We have considered the contentions by some of the commenters that by granting waiver of the Rules to permit operation of the TV Interface Device prior to the completion of this rulemaking we have prejudiced its outcome. We disagree. In each case of approval of a request for waiver, we considered foremost the particular facts presented by each petitioner. We granted each petitioner interim relief on this basis. We did so to further the public interest in realizing the benefit of the latest technologies incorporated in devices such as the stand-alone RF modulator. In deciding upon the final rules adopted herein we relied very heavily on the informed pleadings of the commenting parties made in response to the proposed rules and have modified them accordingly. As a by-product of the operation of TV Interface Devices pursuant to individual waivers, moreover, we had available a field test of sorts of the interference potential the TV Interface Device posed to home TV reception. If operation of TV Interface Devices had resulted in unacceptable interference, we certainly would have taken appropriate action in this rulemaking. For these reasons, we believe that each of the waivers specifically responding to the good cause shown by the petitioner was granted in the public interest, and did not prejudice the outcome of the rulemaking. In fact, because of the favorable experience with the TV Interface Device, the soundness of our decision is enhanced.

28. In the *Notice*, we had proposed a set of procedures for measuring whether a device met with the emanation limits we had proposed. These measurement procedures were proposed as part of the Rules for the TV Interface Device. (*See* Appendix B, proposed § 15.701 et seq. of the *Notice*.) Upon reevaluation of those proposals, in part because of the comments, we have made small changes in the measurement procedures. Among the more important is the elimination of references to broadband noise. Our experience in testing TV Interface Devices has shown that the emission voltage peaks are separated sufficiently that they can be resolved by the measuring instrument—more indicative of narrowband noise. On another point, we eliminate the options of mounting the TV Interface Device on a turntable or of moving the measuring equipment about the device to test it for the direction of maximum radiation for each predominate emission. We believe that specifying that only a turntable may be used will enhance the certainty and repeatability of the tests.

29. As noted above, we have authorized by grants of waivers of the Rules the marketing and operation of TV Interface Devices prior to the effective date of the attached Rules. Marketing of TV Interface Devices authorized under the terms of the waiver may continue without any further action on the part of the grantee. Operation of

such devices may continue indefinitely, subject only to the non-interference requirements in § 15.3 of FCC Rules. (*See* Appendix C, Rule § 15.626.)

30. In addition to the revisions in the measurement procedures themselves, we have decided that they should serve only as recommended procedures for determining compliance with our Rules. The Commission's laboratory however will utilize the procedures set out in the publication, *Recommended FCC Measurement Procedure for the TV Interface Device*, MP-3, to check compliance with the Rules. It will be available through the FCC's duplicating contractor and the National Technical Information Service (NTIS) or both.[14]

V. ORDERING CLAUSES

31. Under the authority contained in Section 1, 4(i), 302 and 303 of the Communications Act of 1934, as amended, IT IS ORDERED THAT the rules including the title, text and table of contents of Subpart H of Part 15 are rescinded and new rules including the title, text, and table of contents of Subpart H of Part 15 are adopted, as set out in Appendix C, attached, effective 30 days after publication of this *Report and Order* in the Federal Register.

32. IT IS FURTHER ORDERED that this docket proceeding, General Docket No. 79–244, is terminated.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendixes A and B-may be seen in the FCC Dockets Branch.

APPENDIX C

Part 15 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 15.4 is amended by replacing the present text of paragraph (m) with the word (Reserved) and by adding a new paragraph (u) to read as follows:

§ 15.4 General definitions.

* * * * * * *

(u) *TV interface device.* A restricted radiation device that produces a radio frequency carrier modulated by a video signal derived from an external or internal signal source, and which feeds the modulated radio frequency energy by conduction to the antenna terminals of a conventional television receiver.

NOTE: A TV interface device may be a stand alone RF modulator, or a composite device consisting of an RF modulator, video source and other components. Specifically excluded is a device that is primarily intended to be part of a cable television system, as defined in Part 76 of this chapter, *and* is owned by the cable system operator.

[14] Currently, the Commission's contractor is the DownTown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037, (202) 452-1422. NTIS is located at 5285 Port Royal Road, Springfield, VA. 22161, (703) 321-8521.

2. Section 15.7 is amended by changing the appended note to read as follows:

§ 15.7 General requirements for restricted radiation devices.

* * * * * * *

NOTE: Radio receivers, cable television systems, computing devices, TV interface devices, low power communication devices, and power line carrier systems as used by electric utilities on power transmission lines are regulated elsewhere in this chapter and are not regulated by this section.

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3. The present title, text, and table of contents of Subpart H is deleted in its entirety and is replaced with a new title, text, and table of contents to read as follows:

SUBPART H—TV INTERFACE DEVICES

15.601 Cross reference.

15.602 Conditions of operation.

15.604 Output signal level.

15.606 Transfer switch

15.608 Output terminal conducted interference limits.

15.610 Radiation interference limits.

15.612 Line conducted interference limit.

15.614 General design requirement.

15.616 Equipment authorization requirements for the TV interface device and attachments thereto.

15.618 Certification of complete TV interface device.

15.620 TV interface device kit.

15.622 Labelling requirement.

15.624 Interference from a TV interface device.

15.626 TV interface device approved prior to (effective date of these Rules).

§ 15.601 Cross reference.

The provisions of Subpart A and B of this Part and Suparts J and K of Part 2 of this chapter shall apply to a TV interface device.

§ 15.602 Conditions of operation.

(a) A TV interface device shall at all times comply with the requirements of this Subpart.

(b) The output signals of a TV interface device shall be coupled to the TV receiver by either wires or coaxial cable provided by the manufacturer of the TV interface device.

§ 15.604 Output signal level.

The voltage corresponding to the peak envelope power of the video modulated signal during maximum amplitude peaks across a resistance (R ohms) matching the rated output impedance of the device, shall not exceed $346.4\sqrt{R}$ microvolts. The voltage corresponding to peak envelope power of the sound modulated signal, if provided by the TV interface device, shall not exceed $77.5\sqrt{R}$ microvolts.

NOTE: If R = 300 ohms, the maximum allowable RMS output voltage of the video carrier is 6000 microvolts and that of the sound carrier, if provided, is 1342 microvolts. If R = 75 ohms, the maximum allowable RMS output voltage of the video carrier is 3000 microvolts and that of the sound carrier if provided is 671 microvolts.

§ 15.606 Transfer switch.

(a) A TV Interface Device shall be equipped with a receiver transfer switch for connecting the antenna terminals of the TV receiver selectively either to the receiving antenna or to the radio frequency output of the TV Interface Device. In either position of the receiver transfer switch, the maximum voltage at the receiving antenna input terminals of the switch when terminated with a resistance (R ohms) matching the rated impedance of the antenna input of the switch, shall not exceed $0.346\sqrt{R}$ microvolts. The maximum voltage shall correspond to peak envelope power of the video modulated signal during maximum amplitude peaks.

(b) A transfer switch is not required for a TV Interface Device designed and marketed for use with a television receiver that receives signals by wire or cable and does not receive over-the-air standard broadcast signals, provided that the device include on the label required by § 15.622 the following statement:

> This device is intended to be attached to a TV receiver, which does not receive over the air broadcast signals. Connection of this device in any other fashion may cause harmful interference to radio communications and is in violation of FCC Rules. *See* 47 C.F.R. Part 15, Subpart H.

NOTE: This statement is to be used in lieu of the statement in § 15.622, on equipment to which § 15.606(b) applies.

§ 15.608 Output terminal conducted interference limits.

At any RF output terminal, the maximum voltage of any emission appearing on frequencies removed by more than 4.6 MHz below or 7.4 MHz above the video carrier frequency on which the TV interface device is operated shall not exceed $10.95\sqrt{R}$ microvolts when terminated with a resistance (R ohms) matching the rated output impedance of the TV interface device.

§ 15.610 Radiation interference limits.

The field strength of any electromagnetic energy radiated from the cabinet, control circuitry and power leads of a TV interface device including that radiated from any associated accessories or attachments shall not exceed the following limits:

Frequency (MHz)	*Field Strength (uV/m at 3 meters)*
30-88	100
88-216	150
216-1000	200

NOTES: 1. The tighter limit shall apply at the edge between two frequency bands.
2. The output terminal of the device shall be terminated by a resistance equal to the rated output impedance.

§ 15.612 Line conducted interference limits.

The RF voltage measured between each power line and ground at the power terminals of the TV interface device shall not exceed 250 microvolts at any frequency between 450 kHz and 30 MHz, inclusive.

§ 15.614 General design requirements.

(a) A TV interface device shall incorporate circuitry to automatically prevent

emanations from the device from exceeding the technical specifications in this subpart. These circuits shall be adequate to accomplish their function when the TV interface device is presented with video input signal levels in the range of one to five volts. This requirement is not applicable to a TV interface device that incorporates a built-in signal source and has no provisions for the connection of an external signal source.

(b) The TV interface device must be so constructed that adjustments of any control accessible to the user will not cause operation in violation of the requirements of this Subpart.

(c) The TV interface device shall be designed and constructed to the extent practicable so as to preclude the possibility that the consumer may inadvertantly attach the output of the device directly to the receiving antenna, if any, without first going through the transfer switch.

§ 15.616 Equipment authorization requirements for the TV interface device and attachments thereto.

(a) A TV interface device shall be certificated pursuant to Subpart J of Part 2 of this chapter to show compliance with the technical specifications in this Subpart. To determine compliance, the TV interface device must be fully exercised with all external devices or accessories that are intended to be marketed and used with it.

(b) An external device or accessory that is intended to be attached to the TV interface device shall comply with the technical and administrative requirements set out in the Rules under which it operates. For example, a personal computer must be certificated to show compliance with Subpart J of this Part.

(c) To determine compliance with the technical requirements of this Subpart, measurements shall be made in accordance with the applicable procedures set forth in the *Recommended FCC Measurement Procedure for the TV Interface Device*, MP-3 or equivalent procedures, provided the applicant can adequately demonstrate to the Commission that such procedures are in fact, equivalent.

Note: MP-3 is available from the National Technical Information Service (NTIS) located at 5285 Port Royal Road, Springfield, Va. 22161 and from the Commission's current duplicating contractor, whose name is available from the Commission's Consumer Assistance Office.

§ 15.618 Certification with the source and internal accessories.

(a) A TV interface device that is submitted to the Commission as a composite device in a single enclosure containing an RF modulator, video source and other component devices shall be submitted on a single application (FCC Form 731) and certificated as a single TV interface device.

(b) Required measurements shall be made with all components operating simultaneously under the test procedures specified in § 15.616(c).

(c) The composite TV interface device shall comply with the technical specifications in this Subpart, with two exceptions. The emanations of a tuner section of a TV interface device, so identified, shall not exceed the technical limits in Subpart C of this Part. The emanations of a TV interface device incorporating a field disturbance sensor shall not exceed the limits in Subparts F and H of this Part, whichever is higher for each frequency.

(d) A TV interface device incorporating a TV tuner shall meet the all channel requirements in §§ 15.65–15.68.

§ 15.620 TV interface device kit.

A TV interface device marketed as a kit shall comply with the following requirements:

(a) All parts necessary for the assembled TV interface device to comply with the technical requirements of this Subpart must be supplied with the kit. No mechanism for adjustment that causes operation in violation of the requirements of this Subpart shall be made accessible to the builder.

(b) Assembly of two TV interface device units of a specific type shall be made in accordance with the instructions being supplied with the product being marketed. If all components required to fully complete the kit (other than those specified in paragraph (a) of this section) are not normally furnished with the kit, assembly shall be made using the recommended components. The assembled unit shall be certificated as any other TV interface device.

(c) The measurement data required for certification shall be obtained for both of these units and submitted with an application for certification.

(d) A copy of the exact instructions that are provided for assembly of the device shall be submitted with the application in addition to other material required by § 2.1033 of this Chapter.

(e) In lieu of the statement required by § 15.622, the following label shall be included in the kit with instructions to the builder that it should be attached to the completed kit:

CERTIFICATION LABEL

(*Manufacturers Name*)
FCC ID _____

This assembled device can be expected to comply with Subpart H of Part 15 of FCC Rules, provided it is assembled in exact accordance with the instructions provided with this kit.

_____
Name, Title, and Signature of Compny Official

STATEMENT OF COMPLIANCE

I certify that I have constructed this kit in exact accordance with the instructions provided with this kit using only the parts provided or recommended by the manufacturer. I understand that the operation of the assembled devices is subject to the following two conditions: (1) This device may not cause harmful interference, and (2) this device must accept any interference received ilncluding interference that may cause undesired operation.

_____ _____
Signature of assembler Date assembled

§ 15.622 Labelling requirements.

A TV interface device shall be identified pursuant to the requirements in Subpart J of Part 2 of this Chapter.

In addition, the name plate or label shall include the following statement:

> This device complies with FCC Rule Part 15. Operation is subject to the following two conditions: (1) This device may not cause harmful interference and (2) this device must accept any interference that may be received, including interference that may cause undesired operation.

§ 15.624 Interference from a TV interface device.

(a) Operation of a TV interface device is subject to the general conditions of operation set forth in § 15.3.

(b) The operator of a TV interface device shall promptly stop operating the device when that operator is advised by the Commission that the TV interface device is causing harmful interference, and shall not resume its operation until the condition causing the harmful interference has been corrected.

§ 15.626 TV interface device approved prior to (effective date—30 days after publication in Federal Register).

A TV interface device that has been type approved as a Class I TV device prior to (effective date of new rules) and that has been labeled with an FCC type approval number may be marketed and operated indefinitely subject only to the non-interference provisions of §§ 15.3 and 15.614. A TV interface device that has been authorized as such prior to (eff. date) by a grant of a waiver of the Rules may continue to be marketed and operated under the provisions of this Subpart without further action on the part of the grantee.

Educational Noncommercial TV Station
License, Renewal of

Application for renewal of educational TV station license granted. Complainant failed to raise substantial and material question of fact as to whether the grant would be in the public interest.
–WHYY, Inc.

FCC 83–89

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WHYY, INC. For Renewal of License of Station WHYY-TV Wilmington, Delaware	File No. BRET-177 BRET-810401KP

MEMORANDUM OPINION AND ORDER

(Adopted: March 3, 1983 Released: March 22, 1983)

BY THE COMMISSION: COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

1. The Commission has before it for consideration the 1978 license renewal application, as supplemented in 1981, of WHYY, Inc. (hereinafter "WHYY" or "licensee") for noncommercial educational television station WHYY-TV, Wilmington, Delaware; a complaint against the licensee filed by the Broadcast and Communications Committee of the City Council of Wilmington, Delaware ("Committee"); comments on the complaint from WHYY and the Committee's response thereto; and supplemental comments by WHYY. Also before the Commission is a letter from the licensee filed in response to a request by the Broadcast Bureau for additional information regarding local Delaware programming broadcast by WHYY and current staffing of the WHYY-TV Wilmington studio.

2. The complaint alleges that WHYY has violated Commission rules in its failure to: (1) serve Wilmington as its community of license and primary service area; (2) operate and maintain its main studio in its city of license; and (3) maintain a public file at its main studio or an accessible place to its community of license. In the Committee's view, ". . . past and current policies and actions of the

WHYY Board of Directors and Management provide evidence that these violations will not cease without action by the Commission."

Procedural Matters

3. In January 1979, the Broadcast and Communications Committee of the City Council of Wilmington filed the above-described complaint against WHYY. At the time the complaint was filed, the license renewal application for WHYY-TV was on deferred status pending resolution of certain questions pertaining to the Commission's inquiry into the adequacy of VHF television coverage in the state of New Jersey. See, *First Report and Order, Inquiry Into the Need for Adequate Television Service for the State of New Jersey* (Docket No. 20530), 58 FCC 2d 790, 36 RR 2d 1105 (1976); *Second Report and Order, Inquiry Into the Need for Adequate Television Service for the State of New Jersey* (Docket No. 20530), 59 FCC 2d 1386, 37 RR 2d 1275 (19760 and *Third Report and Order, Inquiry Into the Need for Adequate Television Service for the State of New Jersey* (Docket No. 20530), 62 FCC 2d 604, 39 RR 2d 137 (1976).[1] Based upon the allegations in the complaint and the deferred status of the WHYY-TV renewal application, the Broadcast Bureau determined that the complaint should be handled as an informal objection to the license renewal application. This decision was based on the fact that the issues raised in the complaint were of the type that are commonly handled in the renewal context. The Commission believes the Bureau acted reasonably and within its discretion to resolve the Committee's allegations in the most efficient manner possible. The Commission therefore will consider the allegations described herein as an informal objection to the 1978 license renewal application, as supplemented, of WHYY, Inc.[2]

Background

4. The following will serve to present the general background and history of WHYY-TV. In 1952, the Commission allocated the Channel 12 frequency to Wilmington as the only VHF allocation in

[1] In the *Second Report and Order, supra*, all area licensees, including those in New Jersey, Delaware, Pennsylvania and New York, were directed to supplement future renewal applications with statements concerning their respective New Jersey service and physical presence commitments. Area licensees were also advised that the Commission would carefully review each future renewal application with special attention being given to New Jersey service commitments. See, *Third Report and Order, supra*, at 609. On June 19, 1978, WHYY filed a supplemental statement to its 1978 renewal application describing programming aimed at the interests and needs of New Jersey residents. Based on our analysis, the Commission finds that WHYY has fulfilled its New Jersey service obligation.

[2] Comments of the parties regarding the allegations contained in the complaint were requested by the Broadcast Bureau following the Commission's decision in *Educational Broadcasting Corporation*, 74 FCC 2d 414, 46 RR 2d 1077 (1979).

the state of Delaware. *Sixth Report and Order*, 41 FCC 148 (1952). During the years 1952–1958, the Channel 12 license was held by several companies operating a commercial broadcast service. None of these licensees, however, was able to make the station profitable and in 1959, the Channel 12 license reverted to the Commission. In that same year, the Commission rejected a petition to reallocate the Channel 12 frequency to Atlantic City, New Jersey. *Allocation of Television Channel in Wilmington-Atlantic City Area*, 18 RR 1653 (1959). In its decision, the Commission stressed the importance of Channel 12 as the only VHF allocation in Wilmington and in the state of Delaware and emphasized "that any station authorized to operate on it will have a duty and obligation to serve the local needs and interests of that community." 18 RR at 1661.

5. In the same proceeding, the Commission rejected a petition by the Joint Council on Educational Television to reserve Channel 12 for noncommercial educational use.[3] The Commission stated that as an allocation matter, it was not prepared to reserve the only VHF channel assigned to Wilmington and to Delaware for educational use, particularly where applications for commercial use of the channel were pending before the Commission. More importantly, the Commission rejected the contentions of several commenters, including MPERTC, that Wilmington is merely a part of the Greater Philadelphia area, stating:

> [I]t is clear that, within the meaning of Section 307(b), Wilmington is a distinct and separate community whose needs and interests are entitled to consideration apart from those of Philadelphia. [18 RR at 1661.]

However, following a comparative hearing to determine which applicant could best operate on the Channel 12 allocation, WHYY was granted a construction permit to operate a noncommercial educational service on the Channel 12 frequency. *Rollins Broadcasting, Inc.*, 34 FCC 1 (1962). At the time of grant, WHYY (as the Metropolitan Philadelphia Educational Radio and Television Corporation) was the licensee of noncommercial television station WHYY-TV, which operated on Channel 35 in Philadelphia[4] and noncommercial radio station WHYY-FM (now WUHY(FM)) in Philadelphia, which is still operated by the licensee today. The Commission determined that a greater need existed for the educational, cultural, and instructional programs proposed by WHYY than the programs

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[3] The reservation proposal was supported by the Metropolitan Philadelphia Educational Radio and Television Corporation (MPERTC), the predecessor organization of WHYY, Inc.

[4] The license to operate on Channel 35 was granted to MPERTC in September 1957. The northern portion of Delaware, including the city of Wilmington, was within the interference-free Grade B contour of the Channel 35 station. In March 1963, the call letters of the station were changed from WHYY-TV to WUHY-TV. Operation of WUHY-TV ceased in August 1976.

proposed by the remaining commercial applicant, particularly as WHYY proposed to offer 16 hours weekly of programming directed to local Delaware interests, groups, and organizations. 34 FCC at 97–98. WHYY began operation on Channel 12 in 1963. In 1970, at the request of WHYY, the Commission reserved Channel 12 in Wilmington for noncommercial educational broadcast use. *Amendment of Table of Assignments . . . . Wilmington, Delaware.* 18 RR 2d 1603 (1970).

Service to Wilmington

Committee's Allegations.

6. The Committee alleges that WHYY has failed to fulfill its statutory obligation to serve Wilmington as its community of license and primary service area. Citing the language of Section 73.613,[5] the Committee states that all broadcast licensees are required to program primarily for their community of license and only secondarily to other communities in the service area. The Committee contends that the Commission has always mandated ". . . a distinctively higher level of broadcast service to the community of license than to the broader secondary service area" and notes that "larger metropolitan areas within the secondary service contour cannot receive a disproportionate amount of programming attention simply because they are of a size larger than the particular city of license." This "principal and primary obligation" of a licensee to its community of license, the Committee maintains, is the expressed policy of the Commission and applies equally to noncommercial as well as commercial broadcasters. In this regard, therefore, the Committee contends that WHYY has failed to fulfill its programming and service obligations to its city of license.

7. The Committee maintains that WHYY has programmed primarily for the city of Philadelphia and not for Wilmington, its community of license. This issue becomes more relevant and of prime importance, the Committee contends, in light of the fact that the frequency on which WHYY-TV operates, Channel 12, is the only VHF allocation in the state of Delaware. As Channel 12 provides the primary means of broadcast service to the state of Delaware, the Committee maintains that WHYY (and indeed any licensee) of the Channel 12 frequency "must provide a significant and primary level of service to the state of Delaware." Citing language of the Commission in its decision to deny a 1959 request to reallocate the

[5] The language of Section 73.613 is now contained in Section 73.1120(a) of the Commission's Rules. That section has been amended to read as follows:

> Each AM, FM and TV broadcast station will be licensed to the principal community or other political subdivision which it primarily serves. This principal community (city, town, or other political subdivision) will be considered to be the geographical station location.

Channel 12 frequency from Wilmington to Atlantic City, New Jersey, see ¶ 4 *supra*, the Committee asserts the Commission specifically recognized that any licensee of Channel 12 would have a duty and obligation to serve the local needs and interests of Wilmington and that this duty was not to be reduced "by the presence of the larger Philadelphia SMSA within Channel 12's broadcast contour." Yet, the Committee states, the licensee of WHYY-TV has chosen to treat Philadelphia as its primary service area and the point of emphasis for the great majority of its programming. The Committee contends this attitude is reflected in WHYY's deviation from its program proposals made in the 1962 comparative hearing to secure authority to operate on the Channel 12 frequency and in its reduction of Delaware-oriented programming during the 1975–1978 license term.

8. The original program proposals of WHYY contained a promise to broadcast 16 hours and 40 minutes per week of Delaware-oriented programming.[6] The Committee contends these program proposals constituted "substantial and specific promises" concerning the provision of locally produced, Delaware oriented programs, including an explicit and implicit promise that WHYY "would in the long run maintain similar Delaware-oriented programming although changes would be made in formats and content of specific programs." According to the Committee, WHYY has not fulfilled those promises. The failure of the licensee to program to provide Delaware-oriented programming "in either the amount, variety, or spirit promised" is seen as especially acute by the Committee in light of the fact that WHYY's Delaware program proposals were a major factor in its selection to operate on the Channel 12 frequency (which was a commercial allocation at that time) over a commercial applicant. As these proposals were made in the context of a comparative hearing for the only VHF allocation in the state of Delaware, the Committee maintains that WHYY must be held to a "very strict standard of compliance" in any assessment of its Delaware program service. The Committee contends that the failure of WHYY to fulfill the spirit and intent of its 1962 program proposals is illustrated by analyzing Delaware-oriented programming broadcast by WHYY during the 1975–1978 license term. As an example, the Committee states that from January to June 1978, WHYY offered only 2 1;2 hours per week of regularly scheduled programs that dealt exclusively or primarily with Delaware news and public affairs. This amount of time was represented solely by *Today in Delaware*, a 30-minute news program broadcast Monday through Friday by WHYY. The Committee states that this 2 1;2 hours per week falls far short of the 16 hours of

[6] This total included the following categories of programs: News - 3 hours and 50 minutes; Public Affairs - 2 hours; Agriculture - 30 minutes; Culture - 5 hours and 30 minutes; Educational (separate from instructional programming) - 3 hours and 50 minutes; and Religion - 1 hour.

Delaware-oriented programming proposed by WHYY and represents only one of the six proposed categories of programs (news, public affairs, culture, agriculture, education, and religion). The Committee notes that, in general, news programming by itself has been found by the Commission to be an inadequate method of programming to meet the needs and interests of a licensee's community of license, citing the *Primer on Ascertainment of Community Problems By Broadcast Applicants*, 27 FCC 2d 650, 677–678 (1971).

9. In regard to reduction in program service to Delaware, the Committee maintains that WHYY has elected to decrease its program commitment to Delaware in order to effectuate an increase in Philadelphia and Pennsylvania-oriented locally originated programs. The Committee contends that during the year 1977, WHYY broadcast only 3 hours per week of regularly scheduled Delaware-oriented programming, including *Today in Delaware* and *Getting on Top of It* (GOTOI), a weekly one-half hour public affairs program. According to the Committee, both these shows devoted their programming orientation exclusively to Delaware. The Committee asserts, however, that certain policy changes initiated in late 1977 by WHYY management indicated that "Wilmington and Delaware public affairs were becoming secondary in WHYY's priorities to the affairs of Philadelphia and Pennsylvania." In January 1978, the production location of GOTOI (WHYY-TV's only local Delaware-oriented public affairs program) was moved from WHYY's Wilmington studio to its Philadelphia studio. The Committee contends the focus of the program then became the institutions, issues and personalities of the city of Philadelphia. According to the Committee, in the six months prior to the move, the 21 GOTOI programs broadcast by WHYY were devoted exclusively to Delaware affairs while in the six months subsequent to the move, only 3 of a total of 19 programs broadcast (15.8%) dealt exclusively with Delaware topics or persons.[7]

10. The Committee maintains that further evidence of a reduction in program service to Delaware and in WHYY's commitment to program to meet the needs and interests of Wilmington is reflected in new programs initiated in 1978 by the licensee. *This Week* and *Neighborhood* are described by the Committee as having Philadelphia as their primary focus. The Committee contends that in 1978 over 82% of the air time of *This Week* focused upon news events and personalities in Philadelphia. Of the five monthly programs of *Neighborhood* broadcast during early 1978, the Committee contends that four were studies of Philadelphia neighborhoods while only one focused on Delaware. Likewise, the Committee asserts that begin-

[7] The Committee's analysis of *GOTOI* programs broadcast from January to June 1978 showed the following geographical focus: 8 (42.1%) - Pennsylvania; 5 (26.3%) - Delaware, New Jersey, Pennsylvania; 2 (10.5%) - New Jersey; and 1 (5.3%) - Delaware and New Jersey.

ning in 1978, the content of *Today in Delaware* was shifted to contain brief summaries of Philadelphia, New Jersey and Maryland news and a review of national news, limiting the amount of time that could be devoted to coverage of Delaware news and events. Moreover, the Committee contends that WHYY's *ad hoc* public affairs programming shows an orientation to Philadelphia as five of the ten *ad hoc* programs broadcast from January to June 1978 were devoted exclusively to Philadelphia and Pennsylvania affairs.

11. As further evidence of WHYY's failure to serve Wilmington as its primary service area, the Committee cites the fact that all of WHYY's management staff and executive officers and offices are located in Philadelphia and that the majority of the Board of Directors (20 of 25 members) are not residents of Delaware. The Committee contends these two factors result in (1) WHYY having little knowledge of Delaware affairs and (2) the needs of the community not being reflected in the licensee's day to day operational and general programming decisions. This insensitivity is highlighted, states the Committee, by the fact that in 1977 the Wilmington studio manager was reassigned to Philadelphia, but was not replaced. The Committee maintains that "the failure to appoint anyone else as station manager is a clear indication of the down grading of the status of the Wilmington studio in WHYY operations."

12. In conclusion, the Committee reasserts its contention that WHYY has failed to serve Wilmington as its primary service area. As stated by the Committee, "it is not contended that WHYY must be held to the exact amount or to the precise type of programming proposed in 1962 to meet its responsibilities to its community of license. It is reasonable to assume that tastes change and considerations, such as financial as well as others, may intervene. However, this does not relieve WHYY of providing adequate Delaware-oriented programming."

Licensee Response

13. In its comments, WHYY denies that it has failed to program to meet local needs and serve Wilmington as its primary service area. The licensee claims that WHYY has provided "the citizens of Wilmington and the tri-state area which it serves with a substantial, meritorious, public television service." WHYY maintains that it has a commitment to serve Wilmington *and* the tri-state area, this commitment being reflected in its choice of programming. According to the licensee, WHYY-TV is a "regional facility with responsibilities to the entire tri-state Delaware Valley area." The licensee contends its regional character is reflected in the composition of its Board of Directors and Community Advisory Board which represents a cross-section of citizens from Delaware, Pennsylvania and New Jersey. WHYY argues, however, that its regional responsibility has not

prevented WHYY from fulfilling its service obligations to Wilmington. For example, WHYY states that in 1978, it produced several local programs responsive to Delaware needs and interests. These programs included *Today in Delaware*, *Blue Hen Review* (a weekly 30 minute review of University of Delaware football[8]), 5 one-half hour political debates and election night coverage, 3 one-hour specials on school desegregation and the Delaware school strike, and a nightly broadcast of the Delaware lottery. In the year 1979, the licensee cites such programs as *Today in Delaware* and the regionally oriented *Ask WHYY* as examples of programs which addressed the needs and interests of Wilmington. WHYY asserts that a great majority of its local program hours are programmed to the needs and interests of Wilmington. In addition, the licensee contends its responsibility to serve Wilmington is achieved through the regional and national programs that WHYY-TV broadcasts. It is the licensee's contention that programs exclusively oriented to Delaware are not the only means by which the service obligations of WHYY can be met.

14. In regard to its 1962 program proposals, WHYY maintains that it is "inappropriate" to evaluate its current Delaware programming based on "programming proposals and promises made nearly twenty years ago." WHYY maintains that the needs and interests of Delaware have changed over the years and that its current program schedule has been devised to meet those changing needs and interests. It notes that the station "conducts on-going ascertainment efforts in Delaware and throughout the tri-state region it serves to monitor how these interests and needs change and to provide programming to reflect them." The licensee contends that it would have neither the funds nor the capacity to produce and broadcast sixteen hours per week of locally originated Delaware-oriented programming while continuing to purchase the quality national programs which it broadcasts. The extent and variety of the national programs available to WHYY today, the licensee states, could not have been anticipated at the time of its 1962 program proposals. Moreover, the licensee asserts that the national system of programs available today addresses the needs and interests of Delaware residents. WHYY maintains it is investing a "significant and meaningful level of program and physical resources to its community of license" while demonstrating its commitment to its Delaware audience through its national programs and a diverse number of programs "devoted exclusively to Delaware interests and needs."

15. In response, the Committee restates its position that WHYY has not met its programming obligations and must comply with the "intent and spirit" of its 1962 programming proposals in order to meet its obligation to serve Wilmington. The Committee notes that many of the programs listed by WHYY as meeting its Delaware

[8] Broadcast for 13 weeks during 1978.

service obligations, including *Getting on Top of It, Blue Hen Review* and *The Garden Club* were discontinued in 1979. The only programs broadcast to address Delaware needs and interests in 1979, the Committee claims, were *Today in Delaware* and the daily one-minute *Delaware Lottery* which represented the broadcast of less local Delaware programming in 1979 than in 1978. The Committee again states that it requests only that WHYY make a commitment to program, at a minimum, an additional 2 1;2 hours per week of programming "relating to issues that have substantial impact on the people and businesses of the State of Delaware."

Discussion

16. We are of the view that the Broadcast Committee of the Wilmington City Council has failed to raise a substantial and material question of fact as to whether WHYY-TV has served Wilmington as its primary service area and reasonably met the needs and interests of its residents. Petitioners have not described any significant problem, need or interest in the Wilmington community which has not been addressed by the licensee. Further, the Committee has not adequately alleged facts to show that WHYY's overall past programming did not meet the needs and interests of the residents within its service area or that its proposed programming is inadequate to meet the needs and interests of Wilmington in the future.

17. The Committee argues that WHYY has not fulfilled its "promises" as outlined in the program proposals submitted by WHYY in the comparative hearing for the Channel 12 frequency and, as such, has not programmed to the needs and interests of Wilmington as its primary service area. To the extent that this argument suggests the need for review of WHYY's program efforts since 1963, we note that WHYY's programming for the period from the inception of its broadcast operations to its last license renewal in 1975 has previously been reviewed and not found to be a bar to grant of WHYY's renewal applications. Indeed, in 1975, the Commission specifically addressed the station's local programming performance. *WHYY, Inc.*, 53 FCC 2d 421 (1975). Among the matters relied upon there by the Commission was that the station had broadcast 10 hours and 5 minutes of locally produced programming during the composite week. We shall not now review those findings. As we stated in *Educational Broadcasting Corporation*, 70 FCC 2d 2204, 2235 (1979), in regard to grant of an renewal application:

> [D]etermination made therein are final, and the most fundamental concepts of fairness and administrative finality preclude our revisiting them in this proceeding.

For this reason, the Commission will not attempt to discuss or review WHYY's programming in prior license terms nor compare that

programming with the licensee's 1962 comparative program proposals. We will, however, analyze and discuss herein the relationship of the licensee's 1962 comparative program proposals and programming broadcast since its last license renewal in 1975.

18. WHYY has an unique position in relation to Delaware television - it is the licensee of the only VHF allocation in the state of Delaware. In acquiring that position, WHYY was accorded preference over a commercial applicant due to its program proposals and its ability to effectuate those proposals to the benefit of the citizens of Wilmington and of Delaware. See *Rollins Broadcasting, supra.* WHYY's original proposal called for 16 1;2 hours per week of Delaware-oriented programming. It is clear, however, that over the last license term, WHYY provided an average of less than 3–3 1;2 hours per week of programming exclusively addressed to the needs and interests of Delaware residents. Thus, it would appear that there has been an erosion in the commitments which lead the Commission to grant the construction permit application of WHYY. This erosion, however, does not indicate that WHYY has failed to fulfill its obligations and to treat Wilmington as its primary service area. As the Commission has stated previously, "licensees are not bound to strict, inflexible adherence to program proposals, but are afforded broad discretion in the manner in which they respond to community problems." *Educational Broadcasting Corporation, supra* at 2237, citing *KORD Inc.*, 31 FCC 85 (1961). It is not unreasonable to expect that over a number of years changes in the interests and needs of the community would precipitate changes in programs presented as well as a change in the number of hours broadcast. It appears that a significant factor in the changes that have occurred at WHYY since grant of its construction permit application is the development of the national public broadcasting system, a factor which was unforeseen in 1962.

19. WHYY describes the national public broadcasting system at the time of its 1962 program proposals as "insular and severely limited in quality, depth and scope." WHYY notes that in 1962, no one, including WHYY, "could have possibly anticipated the extent and variety of national programming currently available to supplement local program production." We agree with the licensee that the current availability of national programming provided by PBS enhances the program schedule that can be presented to Wilmington as WHYY's community of license and that such programming can address and meet the needs and interests of Wilmington as WHYY's primary service area. Programming which reflects service to Wilmington as WHYY's primary service area is not limited to programming which exclusively involves Delaware persons and issues. Regional, national and international topics may be of interest to the residents of Wilmington as well as programs specifically designed for Delaware. The interests of Delaware residents, it can be concluded,

flow beyond the confines of the borders of Delaware to topics of interest outside the state. Such interests are addressed by such national programs as the *McNeil-Lehrer Report*, *Wall Street Week*, *Over Easy*, and *The Advocates*, which are broadcast by the licensee. However, despite the wealth of national programs, an educational licensee must also provide a local program service which addresses the unique problems, needs and interests of the community it is licensed to serve.

20. Both the Committee and WHYY have addressed the service obligation of WHYY and the manner in which that service can be provided. The Committee believes WHYY's service obligation should be met through the provision of a greater amount of locally-produced, Delaware-oriented programs (exclusive Delaware programming) than the licensee has provided in the past (approximately 3–3 1;2 hours per week). WHYY maintains that its regional orientation and regional emphasis in its program schedule meets the needs and interests of Wilmington and Delaware residents.[9] Although WHYY believes that it is a television station licensed to serve Wilmington and the "[a]lmost equally important . . . adjacent metropolitan areas of Philadelphia and Camden," the licensee's first and primary obligation is to serve the local needs and interests of its community of license - Wilmington. This primary obligation to Wilmington, contrary to WHYY's assertions, has been emphasized by the Commission for at least the last twenty-three years. See paras. 4–5, *supra*. As noted previously, Wilmington is a separate and distinct community whose needs and interests are entitled to consideration apart from those of Philadelphia. While regional programs can address the interests of Wilmington residents, such programs cannot serve other service area residents to the detriment of the citizens of Wilmington. The licensee's prime and most important focus must be on the problems, needs, and interests of its community of license. However, as we outlined in our 1975 decision to renew the license of WHYY, 53 FCC 2d 421 (1975), while the station's primary obligation is to serve the needs of its city of license, WHYY also has a *secondary* duty to serve other nearby areas including Philadelphia, Camden, and Trenton, New Jersey. Thus, the broadcast of certain program material by WHYY addressed to Pennsylvania and New Jersey residents (as well as to those of Wilmington and Delaware) does not indicate a lack of commitment on the part of WHYY to serve Wilmington as its primary service area. The broadcast of such programs in 1978 and 1979 as *Ask*

[9] In its comments, the licensee places great emphasis on its regional responsibility and the fact that "Wilmington is part of the fourth largest television market in the nation." Indeed, WHYY describes itself as "a regional facility with responsibilities to the entire tri-state Delaware Valley area." At several junctures in its pleadings, WHYY submits language from past Commission decisions which it purports is an indication that the Commission approves its "regional mission."

WHYY, Black Perspective on the News, Another Voice, and *This Week,* described by the licensee as regional in their orientation but of interest to Delaware residents, aids in the fulfillment of WHYY's obligation to serve its community of license.

21. In addition to the national and regional programs it has presented, it appears that WHYY has also broadcast local programs that were primarily, if not exclusively, addressed to the needs and interests of Wilmington residents. During the license term 1975–1978, such programs as *Getting on Top of It* (public affairs), *Take 12,* and specials on school desegregation and the school strike in Wilmington were broadcast by WHYY. In 1978, the licensee broadcast such local programs as *Today in Delaware* (news), *Blue Hen Review* (University of Delaware football review), a special on the visit of then President Carter to Wilmington in February 1978, and the *Delaware Lottery.* All these programs were oriented primarily to address the specific interests of Wilmington residents. We are concerned that in 1978, WHYY did not broadcast a public affairs program which was oriented primarily to Wilmington residents. However, we have sufficient information to conclude that the licensee's programming during the years 1975–1978, with its mix of Wilmington and Delaware-oriented programming, programming addressed to the tri-state area and national programming, was sufficient to meet its obligation to serve its primary service area.

22. Analysis of WHYY's program schedule for the period after 1978 again reveals a mix of national, regional, and some Delaware-oriented programming. WHYY broadcast such "regional" programs as *Ask WHYY* and *Another Voice,* which addressed such general topics as the mortgage crunch, condominium conversion, job stress, trends in education, problems of the elderly, taxes and inflation, health care and social services, and the environment and energy - all topics that can be assumed to be of interest to the residents of Wilmington and Delaware.

23. We are concerned that in 1979 the *only* locally produced programming which was oriented primarily to Wilmington residents was the daily news show *Today in Delaware* and the Delaware lottery. Further, in 1978 and 1979, WHYY did not broadcast a public affairs program addressed primarily to the needs and interests of the residents of Wilmington. The provision of Delaware-oriented news and public affairs is of prime importance as Channel 12 is the only VHF television station licensed in the state of Delaware and the only television station licensed to Wilmington. As such, it is the only station which currently must place its primary focus of local news and public affairs on Wilmington.[10] Continuation of Delaware-ori-

[10] There are presently outstanding two construction permits for new stations to serve Delaware - WDPB, Channel 64, Seaford, Delaware (noncommercial) and WKME-TV, Channel 38, Seaford, Delaware (commercial). Seaford is located in the extreme southern portion of the state. Additionally, there are currently

ented news and public affairs programming by WHYY thus is of prime importance and is paramount to the licensee's fulfillment of its service obligations. The decision to give Delaware's only public affairs program, *Getting on Top of It*, a regional orientation and then to delete such programming entirely in 1979 would ordinarily be of concern to this Commission. We note, however, that in April 1980, WHYY began broadcast of the *First State*, a weekly 30-minute public affairs program described by the licensee as an "in-depth look at Delaware issues." In addition, at the same time, WHYY began broadcast of *First Statements*, a "point-counterpoint commentary on topical issues by private citizens and public officials" broadcast for 2 minutes on weekday nights. With the addition of these programs and continuation of *Today in Delaware*, we believe that WHYY has not abused its discretion as to the amount of Delaware-oriented programming which is directed primarily at Wilmington residents. Based on these circumstances, no substantial or material question of fact is raised as to the sufficiency of WHYY's program service.

Establishment of Main Studio in Philadelphia

24. The Committee contends that WHYY has, without authorization or the prior approval of the Commission, located its main studio in Philadelphia rather than in Wilmington, its community of license. WHYY has maintained two studios since it began operation on the Channel 12 frequency, one in Wilmington and one in Philadelphia. The Committee asserts that the Philadelphia studio functions as WHYY's main studio and primary base of operation in contravension of Commission rules which require a licensee to operate and maintain its main studio in its community of license. The Committee notes that while auxiliary studios may be constructed or maintained, the main studio of a licensee may only be located outside the community of license after specific Commission authorization. WHYY, the Committee contends, has never petitioned the Commission for authority to move its main studio from Wilmington to Philadelphia.

25. The Committee bases its allegation that WHYY's main studio is located in Philadelphia on three factors: (1) the proportion of programming which originates in the Philadelphia studio vis-a-vis the Wilmington studio; (2) the number and status of personnel and staff located at the Philadelphia studio; and (3) the location of the public file in the Philadelphia studio. In support of its allegations, the Committee contends that the Wilmington studio fails to meet the test established by the Commission in *Nationwide Communications Inc.*, 18 FCC 2d 171 (1969), that a studio is a licensee's main studio if

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pending several applications for a new commercial station to operate on Channel 61 - Wilmington. These stations will have an obligation to serve Delaware residents.

more than 50% of its non-network programming hours originate from that studio. Utilizing this test, the Committee states that analysis of the non-network programming originated by WHYY-TV during the first six months of 1978 indicates that WHYY's Philadelphia studio is its main studio. The Committee has included in its petition a breakdown of the regularly scheduled non-network programs broadcast each week during the first six months of 1978 and their place of origination. The Committee found that 2 hours and 45 minutes per week of regularly scheduled programming (52.4%) were produced in Philadelphia while only 2 hours and 30 minutes per week (47.6%) originated in Wilmington.[11] As to ad hoc programming (specials, etc.), the Committee did not submit specific data, but stated its belief that a greater proportion of ad hoc programming originated in the Philadelphia studio than in the Wilmington studio. Part of this assumption, the committee states, is based on the fact that fund raising and related programming originate solely from the Philadelphia studio.

26. As to personnel, the Committee notes that WHYY's 1978 license renewal application indicated that WHYY had 95 employees. According to the Committee, based on "the best information available to the petitioners, a maximum of 15 or 16 people are employed at the Wilmington facility."[12] The Committee also claims that the status of personnel at each studio reflects the de facto establishment of the WHYY main studio in Philadelphia. The Committee notes that *all* corporate offices of WHYY are located in Philadelphia and that all of WHYY's managment and executive level personnel work in Philadelphia. The Committee submits that "[g]iven the number and status of Philadelphia studio personnel in comparison to Wilmington, no serious claim can be made that WHYY's main studio is located in Delaware."[13]

27. Finally, the Committee maintains that WHYY's placement of its public file in Philadelphia is reflective of WHYY's use of the

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[11] The Committee also noted that the 2 hours and 30 minutes per week which originated in Wilmington were attributable to only one program - the local news show *Today in Delaware*. No public affairs programming was produced in Wilmington during this period.

[12] The Committees notes this number represents less than 20% of the total staff of WHYY and reflects a 5 to 1 ratio as to the distribution of personnel between Philadelphia and Wilmington.

[13] The Committee maintains that the establishment of a de facto main studio in Philadelphia deprives the citizens of Wilmington and Delaware of an accessible studio. The 60 mile roundtrip between Wilmington and Philadelphia is described by the Committee as a "insurmountable barrier to the ability of the residents of the city of license to freely communicate and interact with personnel of WHYY, particularly at the management level." The Committee further contends that "in the absence of a day-to-day presence in the community of license of management and corporate personnel, WHYY decisionmakers fail to acquire a working knowledge of the city."

Philadelphia studio as its main studio and is in itself a violation of Commission rules. The Committee alleges that WHYY failed to maintain a public file in its Wilmington studio or in a place that is convenient and accessible to the residents of Wilmington. The Committee notes that the WHYY-TV public file is located in Philadelphia and that no part of the public file or copies thereof are maintained in Wilmington. Indeed, the Committee states that on several occasions representatives of the Committee sought to review the public file at the Wilmington studio, only to be told that the public file was available only in Philadelphia and that the licensee had no obligation to maintain a public file in Wilmington.

28. In response, WHYY rejects the allegations of the Committee that the Philadelphia studio functions as its main studio. Noting that WHYY has a long history of ties to Philadelphia, the licensee contends that "its Philadelphia-licensed FM station, its formerly-licensed UHF television station, and its regional mission explain its major Philadelphia presence."[14] Notwithstanding its Philadelphia presence and "its responsibilities as a Pennsylvania corporation", the licensee maintains that use of its Wilmington studio is in full compliance with the main studio rule. As to programming, the licensee asserts that analysis of the full calendar year 1978 indicates that a majority of the local programming broadcast by WHYY-TV originated from the Wilmington studio. WHYY contends that a total of 206.25 hours of local programming was produced and broadcast by WHYY-TV of which 139.75 hours (67.8%) originated in the Wilmington studio and 66.50 hours (32.2%) in the Philadelphia studio.[15]

29. As to the public file, WHYY acknowledges that *until the fall of 1978*, the public file was maintained in Philadelphia and not at the Wilmington studio. According to the licensee, the public file was moved to Wilmington in the fall of 1978 and has been available to the residents of Wilmington for inspection since that time.[16] As to staffing, WHYY states that as corporate entity it employs 134 people, 70 of whom work in television alone.[17] Of this number, WHYY states that 18 or 26% work in Wilmington alone while 30 or

[14] WHYY, Inc. is the licensee of Station WUHY-FM, Philadelphia. In 1957, WHYY became the licensee of WHYY-TV (changed to WUHY-TV in 1963), Channel 35, Philadelphia. The license for WUHY-TV was relinquished by the licensee in August 1976.

[15] The licensee's analysis of programming originated in Wilmington includes such programs as *Today in Delaware, Blue Hen Review, Delaware lottery, TV Garden Club*, and political specials.

[16] The Committee, however, in response to WHYY's comments, claims that while the public file is now located in Wilmington, it is not kept current or complete so as to comply with Commission regulations.

[17] According to WHYY, 24 persons work exclusively for WUHY-FM. Another 40 supervise or support both the radio and television operations (i.e. membership, development, finance and administration). It appears that all these persons are located in Philadelphia.

so work in both locations. The others are technical staff who mainly work at WHYY's transmitter site. Despite the lower number of staff assigned to Wilmington, the licensee contends that allocation of staff does not violate any Commission rule or policy. WHYY argues that as the licensee of both a Philadelphia and a Wilmington facility (and due to the asserted "regional character" of its broadcast service and its engaging in program production for national distribution), it would not be financially possible or prudent for WHYY to maintain duplicate staffs in Wilmington and Philadelphia. Moreover, WHYY states that the primary concern behind the main studio rule is not "staff location *per se*", but that service be maintained to the community of license. It asserts that WHYY meets that test.[18]

Discussion

30. This Commission has long adhered to an established policy that the public interest is best served by a licensee maintaining its main studio in the community it is licensed to serve. This policy is predicated on the belief that a requirement that the main studio be located in the community of license will assure that licensees will meet their service obligations by presenting programming that addresses the needs and interests of the city of license. As we stated in *Nationwide Communications, supra*, " . . . the definition of a main studio is directly related to our policy of requiring a licensee to place a primary emphasis on the needs and interests of its city of license." 18 FCC 2d at 174. Unlike the situation involving radio licensees, we have considered in the past several factors in determining a television licensee's compliance with our rule requiring the location of the station's main studio in the principal community to be served, See, *e.g., Gulf Television Co.*, 20 FCC 734 (1956). Such indicia have included the number and function of employees at each studio and the facilities that each studio contains. However, a prime factor has been the percentage of programming originating from the respective studios. In this regard, in the *Nationwide Communications* case, we considered whether the majority of not only the local, but also the total non-network programming presented by the station originated from the claimed main studio. Later, in *KTVE, Inc.*, 22 FCC 2d 477 (1970), we found the television licensee in compliance with the rule where approximately 53.1% of its "local live programs" originated from the station's main studio. It was noted, however, that as the

[18] WHYY maintains that other fundamental reasons exist for its major corporate presence in Philadelphia, the most important of which is the need of WHYY to "be visible and active in the community from which it derives the greatest share of individual and private sector support. While aggressively seeking support in its community of license, WHYY, Inc.'s presence in the Philadelphia area is critical to its ability to reach the greatest concentration of financial resources in the region. The ability to generate those funds can only help Station WHYY-TV's service to Delaware."

percentage of local programming approached 50%, the other indicia became more important. *Id.* It is against this backdrop[19] that WHYY-TV's past performance will be considered.

31. The licensee provides information that in 1978 WHYY-TV broadcast a total of 250.75 hours of local programming,[20] of which 139.75 hours (55.7%) were produced in Wilmington and 111 hours (44.3%) were produced in Philadelphia, as follows:

Produced in Wilmington

Today in Delaware[21]	117.50 Hours
Blue Hen Review	7.00
TV Garden Club	4.50
Others (political specials, etc.)	10.75
	139.75 Hours

Produced in Philadelphia

This Week	17.0 Hours
Getting on Top of It	20.0
TV Garden Club	19.5
Ask WHYY[22]	22.5
Neighborhood	4.0

[19] Effective December 10, 1979, however, the television program origination rule was amended and incorporated with the radio rules. 44 Fed. Reg. 69933. The joint rule, Section 73.1130, provides in pertinent part that "*more than 50%* of an AM, FM or TV station's *non-network programs* shall originate from the station's main studio or from points which are remote from the main studio as long as such origination points are situated in the principal community which the station is licensed to serve." (Emphasis added.)

[20] Neither the Committee nor WHYY provided data pertaining to years prior to 1978. Accordingly, our analysis will begin with that year. Further, although we have information as to the total amount of local programming produced in Wilmington and Philadelphia, we have insufficient information to determine the total amount of non-network programming (local and other) broadcast from each studio for neither the Committee nor WHYY provided an analysis based on non-network, as opposed to local programming.

[21] Includes the one-minute Delaware lottery.

[22] WHYY, in its response to the petition, did not include the hours broadcast of *Ask WHYY* and *Black Perspective* in its analysis of non-network program hours originated in Philadelphia, noting that *Ask WHYY* was specifically underwritten and *Black Perspective* was a national PBS program produced by WHYY. We conclude that these programs should be included in this analysis. The source of funding is not determinative of whether a program is local and non-network. *Ask WHYY* was produced and originated as a local, non-network program by WHYY and should be included in these totals. While *Black Perspective* was a program produced for national distribution on the PBS system, it also meets our definition of a local program. Section IV of the license renewal form for noncommercial licensees includes a definition of "local programs." A program produced by a station and fed to a network, such as *Black Perspective*, is classified by the originating station as local. Further, *Black Perspective* is broadcast by WHYY to

Black Perspective[22]	22.0
Others (as above)	6.0
	111.0 Hours

32. Based on WHYY's 1978 program showing, it is clear that the station did slightly exceed the minimum level of local programming expected to be originated from its Wilmington studio. Under the circumstances of this case, however, this showing is not dispositive of the question of whether WHYY-TV has *fully* complied with the main studio location rule. As previously indicated, no information has been provided as to the amount of all non-network programming originated from either WHYY-TV's Wilmington or its Philadelphia studio. We are also concerned by the fact that the vast majority of WHYY's total television employees (95) are based in Philadelphia.[23] The licensee's response to the Commission's request for a list of the staff based in Wilmington shows that in 1981, only twenty-two people worked at the Wilmington studio. In addition, all top management and executive-level personnel have their offices in Philadelphia. The highest ranking and only management-level employee located in Wilmington is WHYY-TV's News Director. Finally, it appears that WHYY considers its Philadelphia presence to be of prime importance. The factors contributing to this conclusion include: (1) the statements of the licensee of its "responsibilities as a Pennsylvania corporation"; (2) its description of its "regional mission"; (3) its emphasis on individual and private sector support in Philadelphia; (4) its apparent view that Wilmington is really only a part of the "fourth largest television market in the country" - namely Philadelphia; and (5) its apparent emphasis in ascertainment efforts on Philadelphia. Additionally, the retention of the public file at the Philadelphia studio until the fall of 1978 is also an indication of the importance WHYY has placed on the Philadelphia studio.

33. From the information before us, it would appear that WHYY has chosen to place primary emphasis on the Philadelphia studio. Although WHYY may have in the past operated the Philadelphia studio as its main studio, there are several factors which we believe indicate the Wilmington studio is now functioning in a manner more consistent with our rules. First, we note that in 1979 there was a dramatic increase in the number of hours of local non-network programming produced in WHYY's Wilmington studio. Analysis of the local programs broadcast in 1979 by WHYY-TV and their place of origination indicates a total of 257 broadcast hours of local

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meet local needs and interests. It is, therefore, not a network program, but a local program which should be included in these totals.

[23] In its 1981 renewal application, the licensee indicated that 51 employees are involved in joint operation of WHYY and the licensee's radio station while 45 are involved in television operation alone.

programming, of which 232.5 hours (90.5%) were produced in Wilmington and 24.5 hours (9.5%) were produced in Philadelphia. Such operation greatly exceeds the level of local programming expected from a main studio in Wilmington. Furthermore, the Wilmington studio is described by the licensee as a modern broadcasting facility with modern equipment, capacity to edit film, studio color cameras, minicam units, and videotape and color film chains for color film reproduction. Thus, while the Wilmington studio may not be as elaborate as the Philadelphia studio in terms of personnel and total office space, it appears to be structured in such a manner as to provide at least the same facilities as the Philadelphia studio. In view of these factors, taken together, it is not clear that the licensee is in violation of Commission rules.

34. As regards the location of the public file, it is apparent that for a number of years WHYY was in violation of Commission rules[24] which require that a licensee's public file be maintained in its community of license. While the public file is now located in Wilmington, it appears that the shift of the location of the public file from Philadelphia to Wilmington occurred only after complaints by residents of Wilmington and the possibility of the filing with the Commission of allegations of violations of Commission rules. The licensee has stated that as soon as the matter of the public file was brought to the attention of its General Manager, the file was placed in the Wilmington studio. It is clear, however, that this matter was brought to the attention of management during the discussions, public meetings and correspondence between the licensee and the Committee which took place from the fall of 1977 to June 1978. Responding after several months to public notice of Commission rule violations does not alter the fact that a continuing violation of Commission rules occurred over a number of years. Such a violation indicates a lack of responsibility to adhere to Commission rules as is required of all broadcast licensees and would normally require some action by this Commission. In the present case, however, we have taken into account the fact that the public file has apparently been maintained in Wilmington since the fall of 1978. No evidence exists that the file, since that time, has not been maintained in full compliance with Commission rules.[25] Under such circumstances, we do not believe that further action is warranted with regard to this issue. While WHYY has violated our rules, we are satisfied that the violation has been remedied. We would admonish and remind the licensee, however, that all Commission licensees are required to be diligent in their responsibility to comply with the rules of the Commission and should take *prompt* self-regulatory measures on

[24] See Section 73.3527 (formerly Section 1.527).

[25] The Committee has not listed any specific or material item of information which is missing from the WHYY-TV public file in contravention of Commission rules.

their own initiative when violations of Commission rules are brought to their attention. Further, we caution the licensee that the Commission may take stricter action should similar allegations against WHYY be substantiated on a future occasion. See *SSS Broadcasting Inc.*, 53 FCC 2d 1231 (1975).

Conclusion

35. In view of the foregoing, the Commission finds that the Broadcast and Communications Committee of the City Council of Wilmington, Delaware has failed to raise a substantial and material question of fact as to whether grant of the license renewal application, as supplemented, of WHYY, Inc. for station WHYY-TV, Wilmington, Delaware would be in the public interest. Despite this conclusion, it is the Commission's belief that the licensee in this case has engaged in practices and procedures which detract from its responsibilities as the licensee of a Wilmington facility. It appears that WHYY has engaged in practices and adopted policies regarding operation of WHYY-TV which have resulted in only minimal service to its community of license. In *Educational Broadcasting Corporation*, *supra* at 2241, ("WNET"), the Commission concluded, among other things, that a public educational licensee who maintained its main studio outside its community of license must maintain a presence in its city of license which is a functional extension of the licensee and includes a visible, *accessible* and fully staffed facility. We therefore directed the licensee to submit a proposal to the Commission, consistent with our findings, which was to include a staffing proposal. Ultimately, the Commission approved a staffing proposal which included a Vice President of New Jersey Operations and a Community Affairs Coordinator, both of whom were to be based in New Jersey. We believe that the WNET case is somewhat analagous to the present case under consideration. While the WNET case involved the operation of an auxiliary studio in WNET's community of license, the Commission believes that our findings in that proceeding stand for the proposition that a licensee, such as WNET or WHYY, who operates the only VHF station in its state of license, must maintain an accessible, fully staffed facility in its community of license and that the Commission may determine whether the staff, as presently constituted or proposed, is adequate to meet that requirement. We conclude that the management staff of the Wilmington studio, as presently constituted, is insufficient to render the licensee accessible to its community of license.

36. As we noted previously, all of the executive and corporate offices and officers of WHYY and all management-level personnel of the licensee, except WHYY's News Director, are based in Philadelphia. It is important that the licensee of any station have decision-making personnel who are readily accessible to the citizens of its community of license for discussion of topics of interest (*e.g.*, public

service programming) to the community. There must be an opportunity for constructive dialogue between the licensee and the community. It appears that the citizens of Wilmington do not have that opportunity to the extent available to the citizens of most communities which have stations licensed to them. To engage in the type of meaningful dialogue described above, the citizens of Wilmington must either travel to Philadelphia (a distance of approximately 60 miles roundtrip) or make a toll-call to Philadelphia.[26] This places too great a burden on the citizens of Wilmington. We believe WHYY should exhibit a more viable and accessible presence in its community of license. Accordingly, grant of the license renewal application for WHYY-TV will be conditioned on establishment by the licensee of personnel based in Wilmington with functions adequate to address the concerns expressed above. The Commission believes such action would render WHYY more accessible to the residents of Wilmington.

37. Further, WHYY is advised of our expectation that it fully comply with the requirements of Section 73.1130 of the Commission's rules. To ensure such compliance, WHYY-TV's license renewal application will also be conditioned upon a demonstration as to the amount of non-network programming broadcast from the Wilmington and from the Philadelphia studios.

38. Accordingly, IT IS ORDERED, That the complaint filed by the Broadcast and Communications Committee of the City Council of Wilmington, Delaware, when treated as an informal objection, IS DENIED.

39. IT IS FURTHER ORDERED, That the application of WHYY, Inc., as supplemented, for renewal of license of Station WHYY-TV, Wilmington, Delaware, IS GRANTED, subject to the following condition:

> That the licensee submit, within sixty (60) days of the date of this Order, a proposal to establish a management-level presence in Wilmington whose functions are designed to address the concerns expressed in paras. 35 and 36, above; and a programming proposal to ensure compliance with the programming origination rule (Section 73.1130).

40. IT IS FURTHER ORDERED, That WHYY, Inc., will submit with its next renewal application a list of all non-network programming broadcast, indicating whether each program originated from the Philadelphia or Wilmington studios and a list of all personnel and their respective functions, indicating to which studio they are each assigned.

41. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send, by Certified Mail - Return Receipt Requested, a copy of

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[26] The licensee states that a toll-free telephone line is available from Wilmington to Philadelphia. The Committee contends, however, that the experience of its members and members of the public is that the "toll-free" number actually connects to the Wilmington studio and that one must pay a toll to reach personnel located in Philadelphia.

this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

Two major factors lead me to support the imposition of reporting conditions on WHYY-TV.

First, it seems evident that WHYY-TV has largely abandoned its city of license in order to base its operations in Philadelphia. It is clear, for example, that WHYY-TV has located the overwhelming majority of its staff—particularly its management staff—in Philadelphia and that its principal programming emphasis has been shifted over the years to Philadelphia. The station even admits that it is engaged in a self-appointed mission as a "regional" station, rather than as a station primarily licensed to Wilmington.

In doing this, WHYY-TV has accomplished what the Commission has twice rejected: the reassignment of channel 12 to a city outside of Delaware. As indicated in our decision, channel 12 was originally assigned to Wilmington as that city's—and indeed, the state's—only commercial VHF assignment. *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 F.C.C. 148 (1952). In fact, the Commission specifically rejected a proposal by The Pennsylvania Broadcasting Co., the Daily News Television Co., the City of Philadelphia and the Philadelphia Chamber of Commerce to assign channel 12 to Philadelphia rather than Wilmington by stating:

> [w]e recognize the size and importance of the City of Philadelphia and the need for the encouragement of economic competition; nevertheless it is our view that under the circumstances presented, the assignment of a fourth VHF channel to Philadelphia would not justify the deletion of the sole VHF channel from [a] cit[y] as large and as important as . . . Wilmington . . . . Moreover . . . in the case of Wilmington, the state of Delaware would lose its only local VHF service.

41 F.C.C. at 266–67.

Even after an unsuccessful attempt to use the channel as a commercial station in Wilmington during the early days of television, the Commission in 1959 rejected yet another attempt to reassign channel 12, that time to Atlantic City, New Jersey. *Allocation of Television Channel in Wilmington-Atlantic City Area*, 18 Rad. Reg. (P&F) 1653 (1959). The Commission found that "there are compelling reasons for retaining the channel in Wilmington and that the mandate of Section 307(b) of the Act supports that result as between Atlantic City and Wilmington." 18 Rad. Reg. (P&F) at 1660. The Commission also made clear that any station authorized to operate on channel 12 in Wilmington would "have a duty and

obligation to serve the local needs and interests of that community." 18 Rad. Reg. (P&F) at 1661.[1] It seems clear to me that the Commission should not allow its clear statements concerning the need for local television service in Delaware to be ignored by a licensee which would prefer to operate from somewhere else.

WHYY's abandonment of Wilmington has reached such a level that the station appears to be in violation of the studio origination rule[2] and, thus, the main studio rule.[3] I am aware that prior to 1979 the Commission used various, and at times contradictory, definitions of main studio. *E.g.*, *compare Nationwide Communications, Inc.*, 18 F.C.C. 2d 171 (1969) (emphasis by the Commission on *non-network* programming broadcast from city of license), *with KTVE, Inc.*, 22 F.C.C. 2d 477 (1970) (emphasis by the Commission on *local* programming broadcast from city of license). However, at least since the adoption of the studio origination rule in 1979, it has been clear that the Commission expects a majority of *non-network* programming to be "originated"[4] from a television station's city of license. *See* 44 Rad. Reg. 69933 (1979).

The only evidence the Commission has of WHYY-TV's non-network programming is that contained in 1978 and 1980 composite week logs submitted by WHYY-TV to the Commission, and both sets of logs suggest that the station is in violation of the studio origination rule. In fact, out of more than 15 hours of non-network programming evident in the 1978 logs, only 2 1;2 hours are readily identifiable as having been broadcast from Wilmington.[5]

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[1] At the same time, the Commission also rejected a petition to reserve the channel for educational use, which proposal was based on a showing that an educational station would "be able to serve the educational and cultural needs of a 20-county area in three states with a population in excess of 6 million." 18 Rad. Reg. (P&F) at 1655. The Commission found that despite this proposed use of the channel, it was clear that under Section 307(b) "Wilmington is a distinct and separate community whose needs and interests are entitled to consideration apart from those of Philadelphia." 18 Rad. Reg. (P&F) at 1661.

[2] 47 C.F.R. § 73.1125 (1982).

[3] 47 C.F.R. § 73.1130 (1982).

[4] I am disturbed that the Bureau apparently does not wish to determine in this case whether "origination" means "produced in" or "transmitted from" or both. We do no service to our licensees or the public or, ultimately, ourselves in perpetuating such a lack of clarity, and I hope this will not compound our efforts to review WHYY-TV's attempts to comply with the studio origination rule.

[5] It has been suggested that WHYY-TV is somehow more deserving of special treatment because it is a non-commercial station and, as such, is dependent in part on increasingly scarce public funds. However, there is no dispensation for non-commercial stations either from the strictures of Section 307(b) or from our studio origination and main studio rules, and in my view the Commission would be hard pressed to justify disparate treatment from commercial stations. It was WHYY-TV's own judgment to apply for a station licensed to Wilmington, just as it was the station's own judgment to create an "auxiliary" studio in Philadelphia, and WHYY-TV should not now be relieved of the consequences of those actions merely because it is a non-commercial station.

The second factor which leads me to support conditional renewal is that the absence of service to and presence in Wilmington borders on a lack of candor with the Commission. After the Commission declined to reassign channel 12 in 1959, WHYY-TV filed an application for the Wilmington channel. The application was mutually exclusive with an application for commercial use of the channel in Wilmington filed by Rollins Broadcasting, Inc., a locally owned, multiple licensee. It is ironic that during the course of the comparative hearing, WHYY alleged that Rollins' broadcast record was one "'of broken promises, deception or near deception of the public and the Commission, violation or near violation of law, shoddy programming, and lack of effective control.'" *Rollins Broadcasting, Inc.*, 34 F.C.C. 1, 88 (Admin. L. J. 1963).

WHYY-TV won the comparative hearing from the commercial applicant and secured the non-commercial use of the channel largely because of its program proposals since, as the administrative law judge found, "Delaware has no television station in operation" and, thus, has "a need for all types of local program service, general or specialized." 34 F.C.C. at 92. Specifically, WHYY-TV proposed approximately 16 hours per week of "live programming to be devoted to local Delaware groups and organizations." 34 F.C.C. at 95–96. In fact, the administrative law judge found that "there is a distinctly greater need for the educational-instructional programs proposed by WHYY than for the additional entertainment programs proposed by Rollins." 34 F.C.C. at 97.

The station is now constrained to admit that it has not lived up to the program proposals with which it won the comparative hearing. In fact, WHYY-TV seeks to be excused from its neglect by saying that it should not be held to proposals made 20 years ago, and the station at least suggests that the proposals were unrealistic since the station claims that it has neither the funds nor the capacity to produce and broadcast 16 hours of Delaware-oriented programming a week.

Times change, of course, and I would not deny the flexibility of a broadcaster to alter its programming to meet those changes. However, what disturbs me about this case is that in order to win the comparative hearing WHYY-TV specifically represented to the Commission that it would implement substantial program service to Wilmington and to Delaware which it now finds inconvenient to do. If at some point WHYY wished to revamp its programming in light of what it contends are substantially changed conditions, then the station would have been well advised to inform the Commission rather than to hope that no one at the Commission would notice.

The measures imposed on WHYY by the Commission seem reasonably calculated to remedy these problems. In essence, WHYY, like other licensees, is required to comply with the Commission's main studio and studio origination rules and to report to the

Commission on the station's compliance. I also understand my colleagues' interest in insuring adequate staffing in Wilmington and hope that WHYY will be responsive to this concern. However, I also hope that this requirement will not devolve into the day-to-day stewardship of WHYY's staffing plans.

In short, I think that WHYY's conduct over the past several years has been unconscionable and believe that the modest conditions we have imposed on WHYY's continued operation will prove adequate. WHYY would be well advised to proceed to put its house in order. If not, of course, the station would appear to be vulnerable at renewal to a group which recognizes that channel 12 is assigned to Wilmington, not Philadelphia.

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